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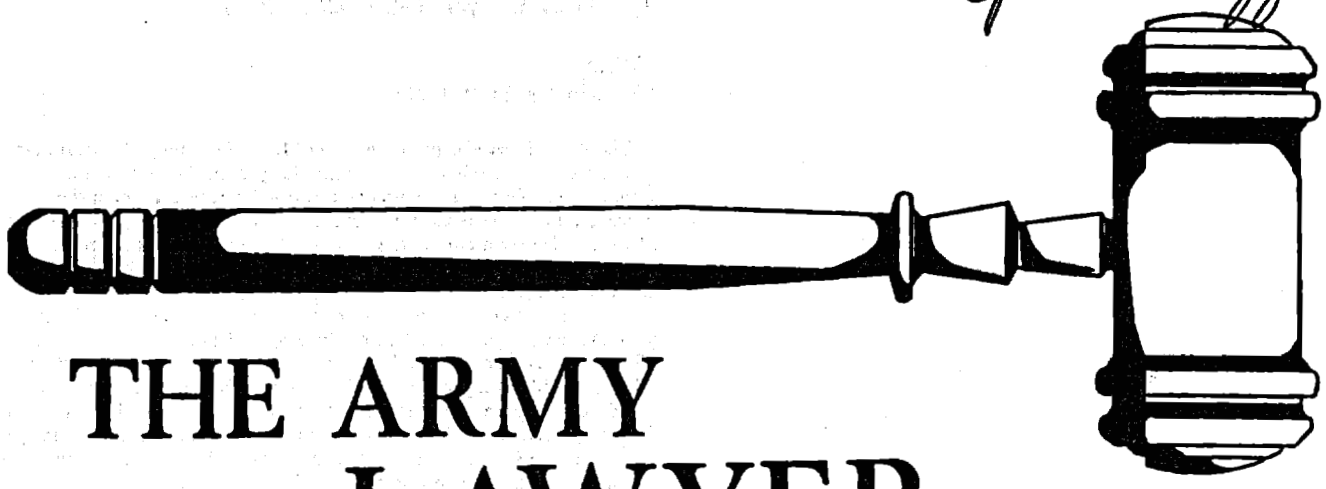

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Editor
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DEPARTMENT OF THE ARMY
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WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-ZA

17 JAN 1986

SUBJECT: Innovation

STAFF AND COMMAND JUDGE ADVOCATES

1. Legal training is an asset which can be used to advantage in many areas not necessarily the traditional focus of judge advocates. A major effort is underway at Department of the Army to increase judge advocate participation in the acquisition process. Other areas ripe for increased judge advocate attention are: medical quality assurance and risk management programs, affirmative claims and recovery, environmental matters, commercial activities, contract fraud and irregularities, Federal litigation, civilian personnel issues, community relations, and Family Action Plan issues.

2. Getting judge advocates involved early in decision making can improve productivity. Judge advocates are well-equipped to act as consultants before decisions in many areas which consume so much of a commander's time and attention, especially when done wrong the first time. All too often our involvement is in reaction to problems which have already developed.

3. Innovative legal involvement in decision making will require a conceptual change in the timing of our use of judge advocates. Getting judge advocates into the day-to-day decision making process means attending meetings and briefings, and must include early and direct access to commanders and principal staff officers. Proactive legal support will be particularly difficult for judge advocates accustomed to beginning legal involvement when an action shows up in the office or the phone rings with an incoming call.

4. Many of you have been on a proactive track for some time. I applaud your efforts. Some of you have a legitimate concern that increased requirements in the military justice area in the future will require realignment of assets. Let's make that adjustment if it becomes necessary. In the meantime, we need to help commanders deal with problems they face today.

5. Discuss this subject with your staffs and commanders and let me know what you are doing, particularly if your innovation has potential for broader application.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

SECRETARY OF THE ARMY
WASHINGTON

7 January 1986

CHARTER OF THE ARMY TASK FORCE ON FRAUD, WASTE AND ABUSE

The Army Task Force on Fraud, Waste and Abuse is hereby created and directed to review and monitor all allegations of fraud, waste or abuse affecting the Department of the Army. The Task Force and its individual members shall take whatever action is necessary to ensure that such allegations are promptly and thoroughly investigated and that appropriate proceedings are initiated. Actions shall be aggressively pursued to ensure that the interests of the Government are safeguarded in an effective and timely fashion.

The Task Force shall meet at the request of the Chairperson at least once a quarter. On a quarterly basis, it will provide a report on the status of its activities to the Secretary of the Army and senior Army officials. Where corrective action is required for a systemic problem, recommended solutions will be provided through appropriate Army officials to the Secretary of the Army.

Within the context of this charter, reports of fraud include, but are not limited to, all criminal reports from investigative services or law enforcement agencies, audit reports, and reports forwarded by subordinate commands. Appropriate proceedings that should be initiated and monitored include all available civil, contractual, and administrative remedies, as well as criminal prosecutions.

The Task Force shall consist of five permanent members provided by those Army offices or organizations with significant responsibility in the fraud, waste and abuse area. The following are the permanent members: the Assistant Secretary of the Army (Research, Development and Acquisition), the Assistant Secretary of the Army

(Financial Management), the General Counsel, The Judge Advocate General and the Commander of the Criminal Investigation Command. The Assistant Secretary of the Army (Research, Development and Acquisition) will serve as Chairperson for the Task Force.

The Task Force will be supported by a permanent work group composed of a general officer or member of the SES (the Deputy Commander in the case of the Criminal Investigation Command) from each office represented on the task force and at least seven special members. The representative from the Office of the Assistant Secretary of the Army (Research, Development and Acquisition) will serve as Chairperson for the work group.

The following shall each provide one representative who is a general officer or member of the Senior Executive Service to serve as special members of the Permanent Work Group: the Assistant Secretary of the Army (Manpower and Reserve Affairs), the Assistant Secretary of the Army (Installations and Logistics), the Deputy Chief of Staff for Logistics, Commander, Army Materiel Command, the Chief of Engineers, the Chief of Legislative Liaison, and the Chief of Public Affairs. Each special member shall serve as an effective point of contact for his office or organization with respect to fraud, waste and abuse matters and participate in proceedings when requested to do so by the Chairperson of the Task Force or Permanent Work Group. The membership of the Permanent Work Group shall have the authority to increase the number of special members when it deems such action appropriate. Further, special working groups of representatives may be formed to support the mission of the Task Force.

I consider this mission to be of the utmost importance, and direct that all elements of the Army cooperate fully with the Task Force, give priority to its requests, and provide it with whatever assistance and resources it requests.

John O. Marsh, Jr.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

JALS-TCA

19 FEB 1986

SUBJECT: Trial Counsel Assistance Program (TCAP) - Policy Letter 86-1

STAFF AND COMMAND JUDGE ADVOCATES

1. Outside the staff judge advocate office, the Trial Counsel Assistance Program constitutes the primary source of Government trial advice and provides the following important services:

a. Biannual advocacy courses on a regional basis within CONUS, and annual advocacy courses in USAREUR and Korea.

b. Solutions to problems encountered by trial counsel. Solutions may range from assistance on Government appeals to advice on issues confronting trial counsel before, during, and after trial. Solutions may be supplied by telephone or in the form of appellate briefs or original position papers.

c. Monthly updates, in memorandum format, to inform trial counsel about time-sensitive military cases and specific problem areas.

d. Critiques of trial counsel.

e. Technical assistance visits to help in particularly complex cases, at the request of the staff/command judge advocates.

2. I encourage each of you to make full use of the Trial Counsel Assistance Program in connection with executing your military justice functions.

William K. Suter

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

Disciplinary Infractions Involving Active Guard/Reserve Enlisted Soldiers: Some Thoughts for Commanders and Judge Advocates

Lieutenant Colonel Robert R. Baldwin, USAR
Staff Judge Advocate, 78th Division (Training), Edison, NJ

I. Introduction

As the reserve components became more heavily relied upon as an integral part of the Army's Total Force during the 1970s, there developed a need for full-time active duty personnel in USAR units in an operational as distinguished from a training status. This need led to the Active Guard/Reserve (AGR) Program[1] under which reservists, on a competitive basis, are ordered to active duty, initially for a period of three years,[2] "for the purpose of organizing, administering, recruiting, instructing, or training" of reserve forces.[3] While on active duty, AGR personnel are subject to the Uniform Code of Military Justice[4] and may be punished under Article 15 or tried by court-martial for military criminal offenses.[5] Their personnel status, however, is unusual in that most administrative law procedures applicable to reserve component (RC) or active component (AC) soldiers were not made expressly applicable to AGR soldiers.[6]

Reserve component commanders have been provided with a summary of options for dealing with disciplinary problems involving United States Army Reserve (USAR) enlisted soldiers.[7] This article will discuss guidelines and options in connection with the disposition of disciplinary infractions involving AGR enlisted soldiers serving in USAR units. While RC commanders are largely in control of the disposition of disciplinary infractions involving USAR enlisted soldiers, they frequently lack authority to deal fully with disciplinary problems involving AGR soldiers. This is not to say that they are powerless in cases involving AGR soldiers, only that current procedures frequently require final action by an active Army commander.

When AGR soldiers are ordered to active duty, their orders specify a duty station (*i.e.*, a USAR unit of assignment or attachment) and an "[a]ctive unit or installation for disciplinary purposes."[8] Thus, there is always a supporting active Army installation at which some unit commander is tasked with handling UCMJ problems involving AGR soldiers. The scope of the phrase "disciplinary purposes" is an open question; however, logic dictates that complete authority to deal with minor disciplinary problems involving AGR soldiers through the application of nonpunitive disciplinary measures lies with the RC commander. Because nonpunitive disciplinary measures may not suffice, RC commanders cannot deal with some disciplinary problems involving AGR soldiers. For example, not being on active duty and subject to the UCMJ, an RC commander cannot impose nonjudicial punishment or prefer charges under the UCMJ.[9] Such matters must be referred with adequate supporting documentation to the designated AC commander at the supporting active Army installation.

The purpose of this article is to provide guidelines for RC commanders and their judge advocates for the proper and expeditious handling of disciplinary infractions involving AGR soldiers. AC commanders who become involved with administering military justice to AGR soldiers may also derive a benefit from this article by gaining an understanding of the problems confronting RC commanders. The first area to be considered is the disposition of minor disciplinary infractions involving AGR soldiers through the use of nonpunitive disciplinary measures. In this area, RC commanders function in just about the same way that they would function in cases involving USAR enlisted soldiers. In cases recommended for disposition under the UCMJ, the RC commander acts as the eyes and ears of the designated commander at the supporting active Army installation. While the AC commander acts upon the RC commander's recommendations, there is a direct correlation between his or her ability to act and the RC commander's efforts in assembling an evidentiary file in the first instance. Finally, this article considers some of the administrative alternatives available to RC commanders for dealing with AGR soldiers. For example, an RC commander may reduce an

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[1] *See generally* Dep't of Army, Reg. No. 135-18, Army National Guard and Army Reserve—The Active Guard/Reserve (AGR) Program (15 July 1985) [hereinafter cited as AR 135-18].

[2] *Id.* at para. 2-9.

[3] *Id.* at para. 1-1.

[4] 10 U.S.C. § 801-940 (1982 & Supp. II 1984) [hereinafter cited as UCMJ].

[5] UCMJ art. 2(a)(1).

[6] For a discussion of the AGR Program as creating a new military personnel status, *see* England, *The Active Guard/Reserve Program: A New Military Personnel Status*, 106 Mil. L. Rev. 1 (1984) [hereinafter cited as England]. In this article, the author traces the origin of the AGR Program and an emerging body of administrative law.

[7] *See* Baldwin & McMenis, *Disciplinary Infractions Involving USAR Enlisted Personnel: Some Thoughts for Commanders and Judge Advocates*, The Army Lawyer, Feb. 1981, at 5, *revised and reprinted in* The Army Lawyer, Mar. 1984, at 10 [hereinafter cited as Baldwin & McMenis (1984)].

[8] Dep't of Army, Reg. No. 135-2, Army National Guard and Army Reserve—Full-time Manning, para. 5g(2)*(a)*, and *(b)* (1 Mar. 1982) [hereinafter cited as AR 135-2].

[9] Only persons subject to the UCMJ may prefer charges thereunder. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 307(a) [hereinafter cited as MCM, 1984, and R.C.M., respectively]. Reservists not on active duty, including RC commanders, are not subject to the UCMJ and, therefore, lack authority to prefer charges. *See* UCMJ art. 2(a)(3); Baldwin & McMenis (1984); *supra* note 7, at 21-25. It follows that if a USAR commander not on active duty lacks authority to prefer charges upon refusal of nonjudicial punishment under Article 15 (*see* MCM, 1984, Part V, para. 3), the commander likewise lacks authority to impose nonjudicial punishment under Article 15. *See also* DAJA-CL 1984/5645, para. 2, 9 May 1984.

AGR member for inefficiency,[10] but an administrative separation must be accomplished at the supporting active Army installation.[11]

The discussion and analysis that follow are cast in the setting of a major USAR command (a MUSARC), but the guidelines involved apply with equal force to other types of reserve commands. Although the focus of the article is on AGR enlisted soldiers in USAR units, its guidelines apply with equal force to AGR enlisted soldiers in the Army National Guard of the United States (ARNGUS, federal status), and the analysis of the disposition of offenses under the UCMJ applies with equal force to USAR and ARNGUS officers (including warrant officers). In situations involving officers, however, initial action is apt to be taken at a higher level of command than the company or battery level.

Considerations similar to those applicable to disciplinary problems involving AGR soldiers in USAR units apply to AC soldiers assigned or attached to such units, and situations where an RC commander can deal fully with AGR enlisted soldiers but not with assigned or attached AC enlisted soldiers, are identified in the article. Because of the state-versus-federal status question involved with AGR soldiers in the Army National Guard (ARNG, state status), disciplinary problems involving such soldiers are not specifically addressed in this article.[12]

II. Nonpunitive Disciplinary Measures

In the day-to-day operation of USAR units, it is simply not practical to refer each and every disciplinary problem to the supporting active Army installation. Rather, RC commanders must deal with these problems as they arise, referring only the more serious problems to the supporting active Army installation. The RC commander's authority to take nonpunitive disciplinary measures is a function of his or her authority as a commander. Specifically, nonpunitive disciplinary measures[13] are administrative, corrective actions which, although perhaps unpleasant for the recipient, are directed towards correction and instruction and not the infliction of a penalty or punishment. Although misconduct is sometimes deliberate and intentional, it frequently results from carelessness or lack of attention. Nonpunitive disciplinary measures permit the RC commander to teach the AGR soldier the error of his or her ways without inflicting a penalty or seriously tarnishing the soldier's record.

Being nonpunitive, these measures generally are not prescribed in the UCMJ. The selection of a particular measure may be affected by such factors as the type of misconduct involved and the AGR soldier's state of mind or length of service. More than one nonpunitive disciplinary measure may be taken in an appropriate case. Some of the nonpunitive disciplinary measures available to RC commanders in dealing with AGR soldiers include admonition and reprimand, administrative restraint, administrative reduction for inefficiency, corrective training, counseling, revocation of security clearance, and withdrawal of discretionary benefits. It should go without saying that because disciplinary problems can occur at any time, RC commanders, as members of the Army's total force, must be prepared to go to the Reserve Center on an administrative basis (*i.e.*, in a nonpaid status) to deal with emerging disciplinary problems of any kind.

Admonition and Reprimand. In response to a specific act of misconduct, a unit commander may issue an oral or written admonition or reprimand as an administrative, corrective measure.[14] A corrective admonition is a warning that the conduct involved is considered to be misconduct and that its repetition will likely result in the taking of more serious action.[15] A corrective reprimand is a rebuke, reproof, or censure (strong criticism) for failing to comply with the required standard of conduct.[16] An oral admonition or reprimand may be administered to an AGR soldier by his or her RC commander at a time and place of the commander's choosing.[17] A written admonition or reprimand is prepared in letter form and should contain a statement that the admonition or reprimand is being imposed as an administrative measure and not as nonjudicial punishment under UCMJ art. 15.[18] A written admonition or reprimand may be included for as long as three years in the temporary section of a soldier's Military Personnel Records Jacket (MPRJ), but only after a copy has been referred

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[10] *See* Dep't of Army, Reg. No. 140–158, Army Reserve—Enlisted Personnel Classification, Promotion, and Reduction, para. 4–37 (22 June 1973) [hereinafter cited as AR 140–158].

[11] The administrative separation of AGR personnel is governed by Dep't of Army, Reg. No. 635–200, Personnel Separations—Enlisted Personnel (5 July 1984) [hereinafter cited as AR 635–200]. *See* AR 635–200, para. 1–6*a*. In such cases, the separation authorities are normally the active Army commanders specified in AR 635–200, para. 1–21. *See* DAJA–AL 1985/2727, 30 Sep. 1985.

[12] For a discussion of the hybrid status of National Guard AGR personnel, *see* England, *supra* note 6, at 20-29.

[13] MCM, 1984, Part V, para. 1*g*; Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 3–3 (15 Mar. 1985) [hereinafter cited as AR 27–10]. For an evaluation of nonpunitive disciplinary measures available to commanders with respect to enlisted personnel in the active components of the Army, *see* Dep't of Army, Field Manual No. 27–1, Legal Guide for Commanders, ch. 8 (18 May 1981) [hereinafter cited as FM 27–1]. It should be noted that FM 27–1 is being revised to reflect changes required by the Military Justice Act of 1983. It was not prepared with the AGR Program in mind. Nevertheless, guidelines for the use of nonpunitive disciplinary measures as discussed in FM 27–1, at 8–1 (Options), generally apply with equal force to RC commanders in dealing with disciplinary problems involving AGR personnel.

[14] MCM, 1984, Part V, para. 1*g*; RCM 306(*c*)(2); AR 27–10, para. 3–3*b*; FM 27–1, at 8–3 (Admonitions and Reprimands). For the rule on suspending favorable personnel actions in connection with admonitions and reprimands, *see infra* note 61. An admonition or reprimand may also be given in response to poor performance.

[15] AR 27–10, glossary at 72; FM 27–1, at 8–3 (Admonitions and Reprimands, Corrective Admonitions).

[16] AR 27–10, glossary at 73; FM 27–1, at 8–3 (Admonitions and Reprimands, Corrective Reprimands).

[17] FM 27–1, at 8–3 (Admonitions and Reprimands, Procedure).

[18] AR 27–10, para. 3–3*b*(2); FM 27–1, at 8–3 (Admonitions and Reprimands, Procedure). *See also* Dep't of Army, Reg. No. 600–37, Personnel—General—Unfavorable Information, para. 2–4*b*(2) (15 Nov. 1980) [hereinafter cited as AR 600–37]. The letter *must* contain this language if the commander intends to request filing in the soldier's Official Military Personnel File.

to the member for acknowledgment or rebuttal.[19] As an even stronger measure, a written admonition or reprimand may be permanently filed in a member's Official Military Personnel File (OMPF) upon the order of a general officer, including an RC general officer.[20]

Administrative Restraint. Although RC commanders have the authority to impose administrative restraint upon AGR personnel (*i.e.*, pending inquiry concerning an alleged offense to assure the member's presence within a given geographical area, or as a precaution to keep the member from being exposed to the temptation of further, similar misconduct),[21] the location of the USAR unit and the AGR soldier's quarters, especially if privately owned or not on a military installation, may limit the effectiveness of this measure. Nevertheless, AGR personnel under administrative restraint may be required to participate in all normal military duties and activities.[22]

Administrative Reduction for Inefficiency. AGR personnel who have served at least ninety days in the same unit may be administratively reduced one pay grade for inefficiency.[23] "Inefficiency" is a demonstration of distinctive characteristics which show the soldier's technical incompetence or inability to perform the duties and responsibilities of his or her grade and military occupational specialty.[24] Although misconduct is not a basis for the administrative reduction of an AGR soldier,[25] misconduct may be considered as bearing on inefficiency.[26] In addition, longstanding unpaid personal debts that an AGR soldier has not tried to resolve can also serve as a basis for a one grade reduction for inefficiency.[27] Although the promotion authority for AGR personnel does not lie with RC commanders, reduction authority has been specifically delegated to RC commanders of company-size units in the case of AGR personnel in grades E–2 through E–4,[28] to field grade RC commanders of organizations authorized a commander in the grade of lieutenant colonel or higher in the case of AGR personnel in grades E–5 and E–6,[29] and to RC commanders of organizations authorized a commander in the grade of colonel or higher in the case of AGR personnel in grades E–7 through E–9.[30] If the immediate RC commander of the AGR soldier being considered for reduction does not have reduction authority, he or she must submit a documented recommendation, through channels, to the appropriate reduction authority.[31] Before accomplishing a reduction, the reduction authority is required to give written notification to the AGR soldier of the basis for reduction, which the member must acknowledge by endorsement.[32] The ARG solidier has the right to submit rebuttal material[33] and should be given an adequate opportunity to do so. The reduction authority must convene a reduction board and act upon the recommendation of this board in all cases involving a reduction from E–6 and above.[34] Reduction board procedures for AGR soldiers are far more formal than those applicable to cases involving regular enlisted reservists.[35] in that AGR personnel have the right of personal appearance before reduction boards

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[19] AR 600–37, paras. 2–4*a*, 2–6; FM 27–1, at 8–3 (Admonitions and Reprimands, Procedure). Such a letter is automatically removed from the MPRJ upon reassignment of the soldier to another general court-martial jurisdiction.

[20] AR 600–37, para. 2–4*b*.

[21] R.C.M. 304(h).

[22] *Cf.* R.C.M. 304(a)(2).

[23] AR 140–158, para. 4–39*b*. For the rule on suspending favorable personnel actions in connection with administrative reductions in grade, *see infra* note 61.

[24] *See* AR 140–158, para. 4–39*a*.

[25] Reductions of AGR personnel for misconduct may be accomplished only through the imposition of judicial or nonjudicial punishment. *See* AR 140–158, para. 4–38*a* and *b*. A civil court conviction, however, is a separate basis for reduction for misconduct. *Id.* at para. 4–38c. Depending upon the severity of the sentence imposed by the civil court or imposable under the UCMJ for a closely related offense, a reduction to pay grade E–1 may be mandatory. *Id.* at para. 4–38*c*(1). For convictions involving less serious sentences, AGR soldiers will be considered for reduction of one or more pay grades. *Id.* at para. 4–38*c*(2). In the case of convictions involving sentences of 30 days or less or suspended sentences of less than one year, two reduction options are available, namely, a reduction of one or more pay grades for misconduct or a reduction of one pay grade for inefficiency. *Id.* at para. 4–38*c*(3). For the reduction of AGR soldiers in pay grades E–6 and above for misconduct due to civil court conviction, reduction board procedures apply. *Id.* at para. 4–38*c*(4). *See also infra* notes 34–36 and accompanying text.

[26] AR 140–158, para. 4–39*a*. Administrative reductions for inefficiency may not be used in lieu of nonjudicial punishment under UCMJ art. 15 or to reduce a member for a single act of misconduct or for actions of which the member was acquitted in court-martial proceedings. AR 140–158, para. 4–39*c*(1)–(3).

[27] AR 140–158, para. 4–39*a*.

[28] *Id.* at para. 4–37*a*. There may be some confusion over whether the delegation of reduction authority is to RC commanders or to some AC commander at the supporting active Army installation designated for disciplinary purposes in the AGR soldier's order to active duty. This confusion arises from the reference in the procedures for appeals from reduction for other than misconduct in the case of AGR personnel reduced from grades E–5 and below. *See* AR 140–158, para. 4–45*a*(1). Specifically, such appeals are to the general court-martial convening authority at the supporting active Army installation, "or the next higher authority, if the [general court-martial] convening authority was the official who reduced the soldier." This confusion is resolved in favor of RC commanders when the specific provision for the delegation of reduction authority is closely scrutinized. In pertinent part, AR 140–158, para. 4–37, provides that "[a]dministrative reduction authority *for attached or assigned AGR personnel* is delegated . . ." (emphasis added). Because AGR personnel are assigned or attached to USAR units, the delegation must necessarily be to RC commanders, the ambiguity raised in the appeal provisions of para. 4–45*a*(1) notwithstanding.

[29] *Id.* at para. 4–37*b*.

[30] *Id.* at para. 4–37*c*.

[31] *See* AR 140–158, para. 4–39*b*(1)–(5).

[32] *Id.* at para. 4–39*d* (Apparently through a printing error in the UPDATE publication, this provision appears as para. 4–39*c*(4)).

[33] *Id.*

[34] *Id.* at para. 4–41*b*. An AGR soldier being considered for reduction for inefficiency who is entitled to a reduction board may waive that right in writing, and such a waiver is considered as acceptance of the reduction action. *Id.* at paras. 4–39*d*(2), 4–41*b*.

[35] *Compare* AR 140–158, paras. 4–41, 4–42 *with* AR 140–158, para. 3–37.

and the right to counsel.[36] AGR soldiers who have been reduced for inefficiency may submit written appeals within thirty days following the date of reduction.[37] In cases involving personnel reduced from E–5 or below, the appeal is normally to the general court-martial convening authority at the supporting active Army installation designated for disciplinary purposes in the member's order to active duty.[38] In cases involving personnel reduced from E–6 or above (*i.e.*, those involving the right to consideration by a reduction board), the appeal is to the RC commander who is the next higher reduction authority above the authority that accomplished the reduction and, if such higher authority is not a general officer, then to the first general officer in the chain of command (whether an RC general officer or an AC general officer) for final review and action on the appeal.[39]

Corrective Training. Corrective training may be used when an AGR soldier demonstrates the need for additional training.[40] Corrective training is appropriate only when there is a direct relationship between the training and the infraction involved (*e.g.*, a soldier who appears in improper uniform may be required to attend special instruction in the correct wearing of the uniform). Corrective training may not be used as a punitive measure and therefore must not have even the appearance of punishment. If corrective training appears to be punitive, then the benefits and effects of all training and instruction are apt to be compromised.

Counseling. Counseling generally involves advising a soldier of his or her errors or omissions.[41] It may be written or oral, but is usually oral. Counseling may be performed by an RC commander personally or by his or her personal representative. In the course of counseling, an effort should be made to determine what caused the misconduct, why the AGR soldier failed to adhere to the proper standards of conduct, and the reasons for his or her negative or indifferent attitude. Properly performed, counseling can provide helpful advice or the necessary inspiration for proper conduct in the future. In the course of counseling, an AGR soldier should be reminded that service on active duty is a privilege and not a right and that continued defective behavior could result in the member's nonselection for retention when his or her record is reviewed by a continuation board.[42] Depending upon the problem involved, an AGR soldier may be referred to a professional counsellor (*e.g.*, a chaplain or a judge advocate).

Revocation of Security Clearance. AGR personnel sometimes have access to classified materials. An RC commander who has information raising serious doubt about the trustworthiness of an AGR soldier (*e.g.*, criminal or immoral activities, alcohol abuse, the habitual use of drugs, repeated AWOL) should take immediate action to suspend the member's access to classified materials.[43] Revocation of a security clearance requires notice to the member, a reasonable opportunity for rebuttal by the member, and further adjudication by the US Army Central Personnel Security Clearance Facility.[44] Because of the sensitive nature of such situations and the complexity of the procedures, cases of this sort must be referred to the S2 or G2 of the unit or of a larger parent unit, as appropriate.[45]

Withdrawal of Discretionary Benefits. To maintain discipline, an RC commander may withhold any privileges he or she is authorized to confer, including the pass privilege.[46] The privilege withheld should have a significant relationship to the misconduct or offense involved (*e.g.*, a commander should not recommend the withdrawal of PX privileges for returning late from a three-day pass). When a commander is authorized to confer a privilege that is to be withheld, he or she simply informs the AGR soldier that the privilege has been revoked for a specific period of time.[47] When the privilege to be withheld is within the power of higher authority to confer, a commander may submit a written request through channels that the member's privilege be withheld.[48] Grounds for the recommended withdrawal of a privilege should be stated in the request.

III. Disposition Under The UCMJ

If an RC commander reasonably believes that an AGR soldier has committed an offense under the UCMJ that cannot be disposed of by employing nonpunitive disciplinary measures, action must be taken, depending upon the circumstances involved, either to refer the matter to civilian law enforcement authorities or to refer it to the supporting active Army installation specified in the member's order to active duty for disciplinary purposes. Because time is of the

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[36] *Id.* at para. 4–43*a*–*c*. A member who declines appearance before a reduction board in writing is considered as accepting the reduction action. *Id.* at para. 4–39*d*(2).

[37] *Id.* at para. 4–45*a*(1), *b*(1).

[38] *Id.* at para. 4–45*a*(1).

[39] *Id.* at para. 4–45*b*(2), (3).

[40] Corrective training is described in FM 27–1, at 8–4 (Corrective Training), and applies with equal force to AGR personnel. *See also* Dep't of Army, Reg. No. AR 600–20, Personnel—General—Army Command Policy and Procedures, para. 5–6 (15 Oct. 1980).

[41] Counseling, as described in FM 27–1, at 8–3 (Counseling), applies with equal force to AGR personnel.

[42] *See* AR 135–18, para. 4–11. An AGR soldier's record is normally considered for retention purposes by a continuation board in the third year of the member's service in AGR status and at five-year intervals thereafter. *Id.* at para. 4–11*a*.

[43] Revocation of security clearance, as described in FM 27–1, at 8–6 (Revocation of Security Clearance), applies with equal force to AGR personnel. *See* Dep't of Army, Reg. No. 604–5, Personnel Security Clearance—Department of the Army Personnel Security Program Regulation, para. 8–102*a* (1 Feb. 1984) [hereinafter cited as AR 604–5]. For a detailed list of derogatory information, *see* AR 604–5, para. 2–200.

[44] AR 605–4, paras. 6–101, 8–201*a*,*b*.

[45] *Id.* at para. 8–101*a*.

[46] The discussion on the deferment of discretionary benefits appearing in FM 27–1, at 8–2 (Deferment of Discretionary Benefits), has some relevancy to AGR personnel. Because AGR personnel do not serve in a garrison situation, however, this nonpunitive disciplinary measure may have only limited applicability.

[47] *Id.* (Deferment of Discretionary Benefits, Procedure).

[48] *Id.*

essence in *effectively* disposing of such matters,[49] and because any recommendation for disposition under the UCMJ may have to pass through one or more levels of command before leaving the USAR command for the supporting active Army installation, the first step that the RC commander should take, even before talking to the AGR soldier, is to contact an appropriate reserve judge advocate.[50] The assistance which a judge advocate can provide can make the difference at the supporting active Army installation between the successful administration of military justice and no action being able to be taken.

In these circumstances, the RC commander's function, with the aid of a judge advocate, is to document the alleged offense or offenses to the extent possible and to forward the matter with a recommendation for disposition. The judge advocate can assist in preparing witness statements and in identifying the offense or offenses involved as violative of one or more specific punitive articles of the UCMJ. In essence, the RC commander must perform a preliminary inquiry much as he or she would do if on active duty.[51] The purpose of the preliminary inquiry is to determine whether the alleged misconduct actually occurred, whether the misconduct constituted an offense under the UCMJ, and whether the AGR soldier in question committed the offense.[52] Once it is determined that the AGR soldier committed an offense or offenses under the UCMJ, the RC commander must then formulate an appropriate recommendation for disposition.

In the course of conducting a preliminary inquiry, the RC commander should obtain any necessary witness statements. Obtaining sworn witness statements may be difficult because of the absence of a person "on active duty" that is authorized to administer oaths under UCMJ art. 136. This problem may be circumvented by using a duly authorized notary public. Extreme caution should be exercised in questioning the AGR soldier suspected of misconduct. In fact, direct questioning should be avoided if at all possible. If the commander decides to question the suspect, adequate warnings against self-incrimination and of the right to counsel must be given.[53] One question that arises is whether the RC commander is a "person subject to the code" for purposes of the Article 31 warning against self-incrimination.[54] While an RC commander not on active duty is not generally subject to UCMJ jurisdiction,[55] he or she is certainly "a person acting as a knowing agent of a military unit and of a person subject to the code";[56] namely, the AC commander at the supporting active Army installation for disciplinary purposes specified in the member's order to active duty. As such, the RC commander is a "person subject to the code" for purposes of Article 31. Because RC commanders are infrequently called upon to give such warnings, they should consult the designated reserve judge advocate in order to assure the adequacy of the warnings they intend to give.[57]

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[49] Perhaps the most serious problem in referring disciplinary matters to the active Army for disposition is the lapse of time between discovery of the commission of the offense and a decision on its disposition. Thus, if the matter reaches the active Army and a decision on its disposition is made, all within a period of two weeks, the disposition may be considered to have been *effectively* made from the standpoint of the administration of military justice, especially if disposition is the administration of nonjudicial punishment under UCMJ art. 15. On the other hand, if the matter should take two or three months to reach the active Army, the disposition may not be terribly effective from the standpoint of the administration of military justice, especially if disposition is the imposition of nonjudicial punishment. RC commanders should be mindful that the matter is further complicated by the fact that in all likelihood, the AGR soldier is a total stranger to the active Army commander who will eventually have to dispose of the matter. While this may create an element of perceived unfairness from the soldier's standpoint, the RC commander should not add to the problem by delaying matters unnecessarily at his or her end of the process.

[50] Staff judge advocate support in the handling of AGR disciplinary matters can be provided in a number of ways. If available, the staff judge advocate of the major USAR command (MUSARC) involved may handle the matter personally. Alternatively, a member of the MUSARC staff judge advocate section may be appointed as an action officer on a particular case. Or, as is done in at least one MUSARC with which the author is familiar, a system of unit legal advisors can be established throughout the MUSARC so that each major subordinate command has first line support by a designated member of the MUSARC staff judge advocate section who is on call to assist in the handling of an AGR disciplinary problem anywhere throughout the major subordinate command. The reserve judge advocate, however designated, being a member of the MUSARC headquarters, can provide assistance in shepherding the action through the various levels of command before reaching the MUSARC headquarters. Indeed, it is absolutely essential for the reserve judge advocate to take an active role in this process so that the action will pass from its point of origin to the MUSARC headquarters as rapidly as possible.

[51] *See* R.C.M. 303.

[52] *See* AR 27-10, para. 3-14; FM 27-1, at 2-1 (Report of Offense, Investigation), 3-2 (Procedure (headnote)). While FM 27-1 has not yet been revised in light of the Military Justice Act of 1983 and the 1984 revision of the MCM, the general descriptions therein with respect to the imposition of nonjudicial punishment and the preferral of charges remain largely accurate.

[53] UCMJ art. 31; United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967). While failure to give the required warnings does not necessarily mean that an AGR soldier cannot be tried, such failure may nevertheless seriously jeopardize the ultimate disposition of the proceeding at the supporting active Army installation. *See* UCMJ art. 31(d); FM 27-1, at 2-2 (Questioning Suspects and Witnesses, Article 31 Warning/Right to a Lawyer).

[54] UCMJ art. 31(a) uses the phrase "person subject to this chapter," but Mil. R. Evid. 305(b)(1) uses the phrase "person subject to the code."

[55] *See supra* note 9 and accompanying text.

[56] Mil. R. Evid. 305(b)(1).

[57] Before any questions are asked, the suspect must be informed of the general nature of the offense or offenses of which he or she is suspected and of the fact that he or she is a suspect. Then, the following script may be used to give adequate warnings:

> Before I ask you any questions, you must understand your rights.
> You do not have to answer my questions or say anything.
> Anything you say or do can be used as evidence against you in a criminal trial.
> You have a right to talk to a lawyer before or after questioning. This lawyer can be a civilian lawyer you arrange for, and if necessary you pay for, or a military lawyer detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name, and he will be detailed for you if his superiors determine that he is reasonably available.
> If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate.

Adapted verbatim from Dep't of Army, Reg. No. 190-30, Military Police—Military Police Investigations, appendix C, para. C-1 (1 June 1978) [hereinafter cited as AR 190-30]. *See generally* the remainder of AR 190-30, appendix C, for further guidance on the questioning of a suspect.

If the AGR soldier requests counsel, he or she may not be questioned further, and the RC commander should complete all other aspects of the preliminary inquiry.[58] While it is desirable to have as complete a file as possible for referral to the supporting active Army installation, the designated AC commander will in any event have to conduct a further, separate preliminary inquiry, and depending upon the circumstances, the AC commander may even have to obtain the aid of law enforcement personnel.[59]

Once a preliminary inquiry is completed, the RC commander has the following options:

1. take no action if the allegations are unsubstantiated,
2. dispose of the matter by means of nonpunitive disciplinary measures, but only if appropriate,
3. refer the matter through channels with a recommendation for the imposition of nonjudicial punishment, or
4. refer the matter through channels with a recommendation for the preferral of charges.[60]

Depending upon the conclusions reached in the course of the preliminary inquiry, it may become incumbent upon the RC commander to initiate a suspension of favorable personnel actions against the AGR soldier.[61] Questions with respect to the suspension of favorable personnel actions should be directed to the MUSARC adjutant general.

One additional option may be available to the RC commander at the conclusion of the preliminary inquiry. This would be to refer the matter through channels with a recommendation that it be referred to civilian law enforcement authorities. This option is viable only if the offense is not a purely military offense (*e.g.*, larceny, rape, assault)[62] and the offense occurred in an area that is not subject to exclusive federal legislative jurisdiction. The final decision on this option would lie with the MUSARC commander. It should be noted that an AGR soldier convicted by a civil court may be administratively reduced, depending upon the severity of the sentence, one or more pay grades[63] and, following such reduction action, considered for discharge.[64] If convicted of an offense which could result in a punitive discharge if tried under the UCMJ or for which the sentence by civil authorities included confinement for at least six months without regard to suspension or probation, the AGR soldier is subject to discharge.[65] If discharge is approved in such a case, the member will normally be discharged under other than honorable conditions and reduced to pay grade E–1.[66]

When the action reaches the MUSARC headquarters, the MUSARC commander, after consulting with the MUSARC staff judge advocate, will have to decide upon an appropriate disposition. If the matter is to be referred to the supporting active Army installation specified in the AGR soldier's order to active duty, the MUSARC staff judge advocate should be in direct, personal contact with his or her AC counterpart so that the matter does not stagnate. Indeed, as the matter progresses, the designated AC commander or law enforcement personnel at the supporting active Army installation may request information that is available in the MUSARC, and this continuing line of communication may become very important. Ultimately, the AGR soldier may have to be sent one or more times to the supporting active Army installation to consult with counsel, for the administration of nonjudicial punishment, or to stand trial.

In considering whether to recommend disposition by the imposition of nonjudicial punishment or the preferral of charges, RC commanders should be aware of the standards that will be employed by their AC counterparts. Although not a hard and fast rule, offenses which are suitable for disposition under Article 15 are "minor" offenses, namely, offenses constituting crimes under the UCMJ other than offenses which if tried by a general court-martial could result

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[58] When a soldier requests counsel, he or she should be referred to a qualified defense counsel at the supporting active Army installation. Use of a reserve judge advocate to advise a suspect is not advisable for a variety of reasons. The reserve judge advocate may not be certified under UCMJ art. 27(b), and this could be made an issue later in the court-martial proceeding. Also, a reserve judge advocate may not be available to represent the suspect in the event of trial, and the question of availability will not arise if an attorney-client relationship is never established.

[59] *See* R.C.M. 303.

[60] *Cf.* R.C.M. 306(c).

[61] In general, favorable personnel actions are suspended, in the case of enlisted personnel in pay grades E–4 through E–9 and all commissioned and warrant officer personnel, when military authorities "make a conscious decision, based on available information to investigate the involvement of the Army member" in incidents or credible allegations reflecting unfavorably on the member. Dep't of Army, Reg. No. 600–31, Personnel—General—Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings, para. 5*a*(5) (1 July 1984) [hereinafter cited as AR 600–31]. Favorable personnel actions must also be suspended against AGR personnel whenever action has been initiated (*i.e.*, whenever an official document commencing the action has been signed) for administrative separation or court-martial (all personnel, including officers), for nonjudicial punishment (all personnel in grades E–4 and higher, but not in cases involving summarized proceedings), for administrative reduction in grade (all personnel in grades E–4 through E–9) or for written administrative admonition or reprimand (all personnel, including officers). *Id.* at para. 5*a*(2)–(4). In cases involving nonjudicial punishment or the preferral of court-martial charges, the suspension would be effected by the AC commander initiating proceedings under the UCMJ, unless earlier initiated by the RC commander. In addition, favorable personnel actions are generally suspended when AGR personnel are entered in a weight control program under Dep't of Army, Reg. No. 600–9, Personnel—General—The Army Weight Control Program (1 July 1984) [hereinafter cited as AR 600–9]. AR 600–31, para. 5*a*(13).

[62] Purely military offenses under the UCMJ include, for example, fraudulent enlistment or separation (art. 83), desertion (art. 85), absence without leave (art. 86), disrespect toward a superior commissioned officer (art. 89), willfully disobeying a superior commissioned officer (art. 90(2)), insubordinate conduct toward a warrant officer or a noncommissioned officer (art. 91(3)), failure to obey a lawful order or regulation (art. 92), and mutiny or sedition (art. 94).

[63] *See* AR 140–158, para. 4–38*c*. For a discussion of administrative reduction in grade for a civil court conviction, *see supra* note 25. For the rule on suspending favorable personnel actions in connection with administrative reductions in grade, *see supra* note 61.

[64] *See* AR 140–158, para. 4–38*c*(1)*(d)*.

[65] AR 635–200, para. 14–5*a*. For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see supra* note 61.

[66] AR 140–158, para. 4–46*a*; AR 635–200, para. 14–3*a*.

in a dishonorable discharge or confinement at hard labor for more than one year.[67]

All that has been said thus far assumes that the AGR suspect is nonviolent and does not otherwise require pretrial restraint.[68] Authority to order pretrial restraint in the case of enlisted soldiers lies with any commissioned officer[69] and, therefore, presumably with RC commanders. As a practical matter, however, RC commanders are not in a position to take the steps necessary to effect pretrial confinement.[70] Accordingly, if the suspect is violent (*i.e.*, likely to engage in serious criminal misconduct) or likely not to appear at trial (*i.e.*, likely to go AWOL),[71] then all the steps heretofore discussed should be by-passed. Instead, law enforcement authorities at the supporting active Army installation should be contacted and the suspect should be turned over to those authorities who will investigate the situation and take those steps necessary to effect appropriate pretrial restraint. The RC commander should then proceed with a preliminary inquiry on an expedited basis in conjunction with the designated AC commander. The MUSARC staff judge advocate should be involved from the outset to assist the RC commander and to keep the MUSARC commander advised of developments. In other words, unusual circumstances require innovative solutions.

The Judge Advocate General has opined that "USAR commanders while performing active duty training have the same authority as their active duty counterparts to initiate and take action under the UCMJ."[72] This clearly suggests that an RC commander on annual training (AT) for one or more days of active duty for training (ADT) can, while in such status, impose nonjudicial punishment on or prefer charges against AGR personnel. In theory, this may be correct, but it is of little practical significance except perhaps for a two-week period of AT. So-called "manday spaces" are strictly controlled and budgeted, and for purposes of imposing nonjudicial punishment, an RC commander might have to be ordered to ADT for two or more days in a very brief period of time. During AT, if enough time remains to conclude an Article 15 proceeding, then perhaps the RC commander might consider exercising his or her authority under the UCMJ. One very serious question remains, however. That is whether UCMJ authority has been withheld from the RC commander by the very terms of the AGR soldier's order to active duty specifying an active Army installation for disciplinary purposes.[73] Thus, in the long run, the procedures discussed above for referral to the supporting active Army installation are the safest and surest approach to the effective handling of criminal misconduct by AGR personnel.

IV. Administrative Alternatives

Depending upon the nature of the behavior or misconduct and a variety of other factors, there are administrative methods and measures that RC commanders can employ in dealing with disciplinary problems involving AGR personnel. These include nonselection for retention in AGR status,[74] involuntary removal (*i.e.*, separation for unsatisfactory performance or misconduct),[75] and bar reenlistment.[76] Written counseling and rehabilitation measures are a prerequisite to most grounds for involuntary removal,[77] and a record of such efforts in the absence of separation can also serve as a basis for nonselection for retention or a bar to reenlistment.

Counseling should include the reasons for counseling, the fact that continued behavior of the sort leading to counseling can lead to separation from the Army (or nonselection for retention or bar to reenlistment), and the consequences of separation, depending upon the behavior involved.[78] Unlike the separation of enlisted reservists under AR 135–178, the separation of AGR personnel is governed by AR 635–200.[79] While a simple memorandum for record of counseling suffices under AR 135–178,[80] the counseling of AGR personnel under AR 635–200 should be recorded on

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[67] MCM, 1984, Part V, para. 1*e*; AR 27–10, para. 3–9.

[68] The four basic forms of pretrial restraint are conditions on liberty, restriction in lieu of arrest, arrest, and pretrial confinement. R.C.M. 304(a). For a detailed explanation of pretrial restraint, *see* Finnegan, *Pretrial Restraint and Pretrial Confinement*, The Army Lawyer, Mar. 1985, at 15.

[69] R.C.M. 304(b)(2).

[70] *See* R.C.M. 305, especially para. (h) thereof.

[71] *Cf.* R.C.M. 305(h).

[72] DAJA–CL 1984/5645, para. 2, 9 May 1984.

[73] *See* AR 135–2, para. 5*g*(2)(*b*); AR 135–18, para. 2–10*a*.

[74] *See* AR 135–18, para. 4–11.

[75] *Id.* at para. 5–1*b*(2) referring to AR 635–200, chs. 13 & 14, which pertain to separation for unsatisfactory performance and misconduct, respectively. Entry level separation for unsatisfactory performance or conduct (AR 635–200, ch. 11) is not considered in this article as few if any reservists are in entry level status upon entering the AGR Program. For a discussion on entry level separation for unsatisfactory performance or conduct as applied to enlisted reservists, *see* Baldwin & McMenis (1984), *supra* note 7, at 26–28. Homosexuality is a form of misconduct that is simply not tolerated in the Army. *See* Dep't of Army, Reg. No. 135–178, Army National Guard and Army Reserve—Separations of Enlisted Personnel, ch. 10 (1 Jan. 1983) [hereinafter cited as AR 135–178]; AR 635–200, ch. 15. Separation for homosexuality is not separately considered in this article. The policies and criteria for separation of AGR personnel on active duty and an enlisted reservist not on active duty because of homosexuality are the same, however. *Compare* AR 635–200, paras. 15–1, 15–3 *with* AR 135–178, paras. 10–2, 10–4. For a discussion on the separation of enlisted reservists because of homosexuality, *see* Baldwin & McMenis (1984), *supra* note 7, at 31–33.

[76] *See* Dep't of Army, Reg. No. 140–111, Army Reserve—US Army Reserve Reenlistment Program, para. 8–6 (1 Jan. 1983) [hereinafter cited as AR 140–111], referring to chapter 1, section VII thereof, providing bar to reenlistment procedures for USAR enlisted personnel generally.

[77] *See* AR 635–200, para. 1–18.

[78] *Id.* at para. 1–18*b*(2).

[79] *Compare* AR 135–178, para. 1–4*b with* AR 635–200, para. 1–6*a*. *See also* AR 135–18, para. 5–1*b*(2).

[80] *See* AR 135–178, para. 1–12*b*(2); Baldwin & McMenis (1984), *supra* note 7, at 27 & n.125.

DA Form 4856 (General Counseling Form) and authenticated by the member.[81] In addition to counseling, RC commanders are usually required to have the AGR soldier reassigned to another unit at least once for purposes of rehabilitation.[82] Although counseling may not be waived, rehabilitation may be waived by the separation authority (generally located at the supporting active Army installation) when the AGR soldier's further duty would create serious disciplinary problems or a hazard to the military mission or the member, when the member has resisted all rehabilitative efforts, or when rehabilitation would not produce the quality of soldier desired by the Army.[83]

When initiating a separation proceeding against an AGR soldier, the RC commander must consult the appropriate provisions of AR 635–200 and proceed accordingly. The action initiating the separation proceeding must be sent through channels to the MUSARC headquarters and, from there, to the supporting active Army installation for disciplinary purposes.[84] It should be noted that in the absence of sufficient evidence, any intermediate commander, including the MUSARC commander, may disapprove the recommended separation and discontinue the proceeding.[85] When a separation proceeding is sent to the separation authority, that headquarters (not the MUSARC headquarters) will effect the appointment of counsel[86] and, when necessary, convene a separation board.[87]

Under AR 635–200, separation boards must have at least three members who may be commissioned or warrant officers or senior enlisted personnel (E–7 or above and senior to the respondent).[88] The senior member is the president, and at least one member must be a field grade officer.[89] A majority of the board must be officers,[90] and the entire board must be commissioned or warrant officers if the proceeding could result in a discharge under other than honorable conditions.[91] Normally, the president presides over the proceedings and rules finally on all evidentiary and procedural matters.[92] If a nonvoting legal advisor is appointed, he or she will rule finally on evidentiary matters and challenges to members of the board except as to him or herself.[93]

To retain potential mobilization assets, it is Army policy to transfer most AGR soldiers approved for separation to the Individual Ready Reserve (IRR) pending completion of their service obligations, and only those separated for homosexuality, misconduct, or having no mobilization potential are discharged.[94] This policy applies to both statutorily obligated soldiers and to contractually obligated soldiers.[95] It does not apply, however, to soldiers having less than three months to serve on their current service obligation.[96]

Nonselection for Retention. Retention in AGR status is determined on a selective basis.[97] An individual's initial AGR tour is for a period of three years,[98] and in the third year, the soldier's record of performance is considered by a

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[81] AR 635–200, para. 1–18*b*(3). Failure to have the soldier authenticate DA Form 4856 does not prohibit its use as a counseling statement for purposes of separation, however.

[82] *Id.* at para. 1–18*c*(2). It should be noted that AR 635–200, para. 1–18*c*(3), suggests involuntary reassignment (permanent change of station transfer) as yet another administrative option available to RC commanders in dealing with disciplinary problems involving AGR personnel. This option is certainly viable with respect to AC personnel assigned or attached to USAR units.

[83] *Id.* at para. 1–18*d*.

[84] The general court-martial convening authority is often both the separation authority for AGR personnel and the convening authority for separation boards. *Id.* at para. 1–21*a*. Depending upon the grounds for separation and other circumstances, however, the separation authority and to authority to convene separation boards may lie at a lower level of command within the supporting active Army installation. *Id.* at para. 1–21*c, d*.

[85] *See* AR 635–200, paras. 13–8*a*, 14–16*a*, 15–7*a*.

[86] *See generally* AR 635–200, glossary, for definitions of "appointed counsel for consultation" and "appointed counsel for representation." While appointed counsel for consultation may be any judge advocate, including a reserve judge advocate, appointed counsel for representation before a separation board is normally a member of the US Army Trial Defense Service. *See* AR 27–10, para. 6–3*g*(2)*(d), h*.

[87] AR 635–200, para. 1–21*a*.

[88] *Id.* at para. 2–7*a*.

[89] *Id.*

[90] *Id.*

[91] *Id.* at para. 2–7*b*(2).

[92] *Id.* at para. 2–7*c*.

[93] *Id.* at para. 2–7*a, c*.

[94] *Id.* at para. 1–36.

[95] *Id. Compare* AR 635–200, para. 1–36*a with* AR 635–200, para. 1–36*c*. In general, a "statutorily obligated member" is an enlisted reservist (who may be an AGR soldier) who is currently serving under a six or eight-year statutory service obligation upon initial entry into the armed forces (*i.e.*, no prior service). Dep't of Army, Reg. No. 135–91, Army National Guard and Army Reserve—Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures, para. 2–1 (1 Feb. 1984) [hereinafter cited as AR 135–91]. Although serving initial enlistments in the armed forces, (1) enlisted male reservists whose entry was prior to 10 November 1979 and who were age 26 or older upon entry, (2) enlisted female reservists whose entry was after 31 January 1978 and prior to 10 November 1979 and who were age 26 or older upon entry, (3) enlisted female reservists regardless of age upon entry whose entry was prior to 1 February 1978, and (4) enlisted male and female reservists who were age 26 or older upon execution of their service agreements and whose service agreements were executed after 9 November 1979 and before 10 December 1979 and reflect no statutory service obligation are *not* treated as statutorily obligated members. AR 135–91, paras. 2–1*b*(1)–(3), *c*. A "contractually obligated member" is virtually any enlisted reservist who is not a statutorily obligated member, generally, and enlisted reservist who is serving under an enlistment contract and either has completed a statutory service obligation or has never acquired one. *Id.* at para. 2–2; Reserve Components Personnel UPDATE No. 14, Consolidated Glossary, at 7.

[96] AR 635–200, para. 1–36*d*. The three month period applies to the soldier's statutory or contractual obligation, whichever expires later.

[97] AR 135–18, para. 4–11.

[98] *Id.* at para. 2–9.

continuation board.[99] If selected for continuation in the AGR Program and not otherwise ineligible, the soldier will be offered a subsequent AGR tour for a period of three years commencing immediately upon completion of his or her current tour.[100] Also, if prior to an initial AGR tour the soldier has not at some time had at least twenty-four months on extended active duty, he or she normally will be required to serve in an active component assignment after completing an initial AGR tour and before continuing in the AGR Program.[101] AGR personnel are again considered for retention by a continuation board at five-year intervals following consideration in the third year of their initial AGR tour.[102]

Clearly, if counseling records and other documentation in the soldier's unit file and MPRJ, including enlisted efficiency reports, reflect that he or she is a disciplinary problem, a continuation board is unlikely to select the member for retention in AGR status. If an AGR soldier is to be nonselected for retention, it is critical that his or her personnel records be properly documented by the RC commander to reflect the disciplinary or behavioral problem. While nonselection is not an option in cases involving AC personnel assigned or attached to USAR units, involuntary reassignment *(i.e.,* permanent change of station transfer) as a rehabilitative measure under AR 635–200 is a possible solution.[103]

Separation for Unsatisfactory Performance. RC commanders are required to separate AGR personnel for unsatisfactory performance if, in the commander's judgment, the soldier will not develop sufficiently to participate satisfactorily in further military training or become a satisfactory soldier or if the factual basis for the commander's determination of unsatisfactory performance is that the soldier's retention would have an adverse impact on morale or on military order and discipline.[104] At one time, RC commanders were also required to take action to separate for unsatisfactory performance AGR personnel who failed to meet body fat standards after application of the procedures prescribed in the Army weight control program.[105] Now, however, overweight personnel are subject to separation for the convenience of the government and, if separated, are transferred to the IRR as mobilization assets in the event of war.[106]

Before initiating an action to separate an AGR soldier for unsatisfactory performance, a commander must be satisfied (and able to show) that retention is likely to have a disruptive effect, that the soldier's performance is unlikely to improve, or that the soldier is unlikely to perform effectively in the future.[107] To allow commanders a great deal of flexibility, the factual bases for unsatisfactory performance are largely undefined, thus leaving much to the discretion of commanders in acting as they see fit in separating problem soldiers. Actions to separate AGR soldiers for unsatisfactory performance must be preceded by adequate counseling and rehabilitation measures.[108]

Even if the mental evaluation that is part of the required medical examination that precedes the request for separation for unsatisfactory performance[109] concludes that an AGR soldier's unsatisfactory performance is due to a personality disorder, the member should still be separated for unsatisfactory performance.[110]

Proceedings to separate for unsatisfactory performance require the appointment of appointed counsel for consultation, unless waived by the soldier.[111] The soldier may also consult with civilian counsel at no expense to the government. There is no right to appointed counsel for representation or to a hearing in cases involving personnel (including AGR personnel) with less than six years of total active and reserve service.[112] Only personnel with six or more years of active and reserve service are entitled to a hearing in unsatisfactory performance cases.[113] Following official notification of the commencement of separation proceedings for unsatisfactory performance, the AGR soldier has not less than three duty days in which to consult with counsel, to prepare and submit any statements in his or her

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[99] *Id.* at para. 4–11*a*.

[100] *Id.* at paras. 2–4, 2–9, 4–11*b*.

[101] *Id.* at para. 4–8.

[102] *Id.* at para. 4–11*a*.

[103] *See* AR 635–200, para. 1–18*c*(3). Permanent change of station transfer may also be a viable solution in certain cases involving AGR personnel. *See supra* note 82.

[104] AR 635–200, paras. 13–2*a*(1), (2). For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see supra* note 61. It should be noted that commanders are required to consider for separation either for unsatisfactory performance or for misconduct (acts or patterns of misconduct) all personnel who are convicted by court-martial but not sentenced to a punitive discharge. *See* AR 635–200, paras. 13–2*e*, 14–2*g*. For a discussion on separation for misconduct (acts or patterns of misconduct), *see infra* notes 123–41 and accompanying text.

[105] *See* AR 635–200, para. 13–2*a*(2) (provision rescinded in Enlisted Ranks Personnel UPDATE No. 3, 15 Jan. 1985).

[106] *See* AR 635–200, paras. 1–36*a*(8), 5–15. In such cases, the commander of the supporting active Army installation for disciplinary purposes will normally be the separation authority. *Id.* at para. 5–15*f*. For a discussion of the Army weight control program (AR 600–9), *see* Baldwin & McMenis (1984), *supra* note 7, at 28 n.138. For an article discussing a proposed revision of Army weight control policies which are expected to take effect on 1 April 1986, *see* Army Times, Dec. 2, 1985, at 1, col. 2. It should be noted that an AGR soldier being considered for separation for the convenience of the government for failure to meet Army weight control standards has the right to request a hearing before an administrative separation board if he or she will have six or more years of active and reserve service at the time of separation. *See* AR 635–200, para. 5–15*c*, (referring to ch. 2, sec. II *(i.e.,* para. 2–2*d*)).

[107] AR 635–200, para. 13–2*a*(4)–(6).

[108] *Id.* at para. 13–4. Counseling and rehabilitative requirements are detailed in AR 635–200, para. 1–18.

[109] *Id.* at paras. 1–34*a, b,* 13–6*k, l*.

[110] "Separation for personality disorder is not appropriate when separation is warranted [for unsatisfactory performance]." AR 635–200, para. 5–13*c*.

[111] *See* AR 635–200, para. 2–2*a*.

[112] *Id.* at para. 2–2*d*.

[113] *Id. See* AR 635–200, figure 2–2 (para. 1 thereof).

own behalf, and, if appropriate, to request a hearing.[114] Upon receipt of the soldier's reply to the official notification, the case is forwarded to the separation authority[115] for final action, including formal board proceedings if requested by a soldier with six or more years of active and reserve service.[116] The service of AGR personnel separated for unsatisfactory performance is characterized as honorable or under honorable conditions.[117] If given an honorable discharge, they are automatically transferred to the IRR for the balance of their statutory or contractual service obligations; those who are discharged under honorable conditions are transferred if it is determined that they can perform useful service during times of full mobilization.[118]

A female AGR soldier who is pregnant may be separated for unsatisfactory performance only when her pregnancy is not the sole factual basis for substandard performance of duty.[119] On the other hand, an AGR soldier who has committed serious acts of misconduct may not be separated for unsatisfactory performance in lieu of separation for misconduct or proceedings under the UCMJ.[120]

Separation for Misconduct (Acts or Patterns of Misconduct). AGR personnel may be considered for separation for misconduct consisting of minor disciplinary infractions, a pattern of misconduct, or the commission of a serious offense.[121] In addition, certain drug offenses may require that a separation action be processed.[122] These grounds for separation for misconduct are in addition to separation for civil court conviction,[123] homosexuality,[124] and fraudulent entry.[125]

The commission of a serious offense as a basis for separation for misconduct includes military and civilian offenses which could result in a punitive discharge if the same or a closely related offense were tried under the UCMJ.[126] A pattern of misconduct includes discreditable involvement with civilian or military authorities, serious offenses, and conduct which violates punitive articles of the UCMJ and the time-honored customs and traditions of the Army.[127] Minor disciplinary infractions is a documented pattern of minor military violations not quite so serious as a pattern of misconduct, but serious enough to render the member disqualified for further military service.[128] Drug abuse cases involving first-time drug offenders in grades E–5 through E–9, all second-time drug offenders, and medically-diagnosed drug dependent soldiers that will not be referred to trial by court-martial under circumstances that could lead to a punitive discharge, or lead to separation because of civil conviction or the failure of drug abuse rehabilitation[129] must be considered for separation for misconduct.[130] Such abuses of illegal drugs are considered to be serious misconduct and are usually processed as the commission of a serious offense.[131] In the event of mitigating factors, however, a single drug offense may be combined with other

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[114] *Id.* at paras. 2–2*e*, 2–4*f*. Because of the wide latitude given to commanders to determine what factually constitutes unsatisfactory performance, it is very important in completing the written notice required by AR 635–200, paras. 2–2 or 2–4, that commanders express in detail the facts and reasons for the proposed separation. In so doing, it would also seem advisable for the commander to draw conclusions paralleling the requirements of AR 635–200, para. 13–2*a*(4)–(6). *See supra* text accompanying note 107. An AGR soldier's failure to reply to the written notice within seven days of receipt constitutes a waiver of various rights including, if otherwise available, the right to a hearing before a separation board. *Id.* at paras. 2–2*e*, 2–4*f*. Accurate counting at the seven day period is assured because the AGR soldier's commander must personally serve the letter of notification and obtain a signed, dated acknowledgment of receipt. *Id.* at para. 2–2*g.1*, 2–4*h.1*.

[115] Although under AR 135–178, para. 1–25*b*, the MUSARC commander is the separation authority for enlisted reservists separated for unsatisfactory performance who have less than six years of active and reserve service, there is no comparable provision in AR 635–200, para. 1–21.

[116] AR 635–200, para. 13–7.

[117] *Id.* at para. 13–11.

[118] *Id.* at para. 1–36*b*.

[119] *Id.* at para. 13–2*d*. For policies and procedures on pregnancy and the options available to pregnant female AGR personnel, *see* AR 635–200, ch.8.

[120] *Id.* at para. 13–2*c*.

[121] *See* AR 635–200, para. 14–12*a–c*. For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see supra* note 61. It should be noted that commanders are required to consider for separation either for unsatisfactory performance or misconduct (acts or patterns of misconduct) all personnel who are convicted by court-martial but not sentenced to a punitive discharge. *See* AR 635–200, paras. 13–2*e*, 14–2*g*. For a discussion on separation for unsatisfactory performance, *see supra* notes 104–20 and accompanying text.

[122] AR 635–200, para. 14–12*d*. *See also* AR 635–200, para. 9–1, note 1. In addition, there is independent authority for the honorable separation of AGR personnel who have voluntarily enrolled in a drug or alcohol rehabilitation program and have failed to become rehabilitated. *See* AR 635–200, ch. 9. For the Army's alcohol and drug abuse program, *see* Dep't of Army, Reg. No. 600–85, Personnel—General—Alcohol and Drug Abuse Prevention and Control Program (1 Dec. 1981).

[123] *See supra* notes 63–66 and accompanying text.

[124] AR 635–200, ch. 15.

[125] *See* AR 635–200, ch. 7, sec. V. Fraudulent entry can result from procuring a "period of active service through any deliberate material misrepresentation, omission or concealment of information which, if known and considered by the Army . . . , might have resulted in rejection." *Id.* at para. 7–17*a*. Accordingly, an AGR soldier who procures an AGR tour by deliberately misrepresenting his or her qualifications or lack of disqualifications is subject to separation for fraudulent entry. This would include misrepresentations concerning any of the special qualifications for selection in the AGR Program listed in AR 135–18, paras. 2–1, 2–2. If the concealed information is both disqualifying and substantiated, a separation action must be commenced. AR 635–200, para. 7–21*a*. The initiating commander may recommend discharge or retention depending upon the circumstances of the case. *Id.* at para. 7–21*a*(6). At worst, the member could be discharged under other than honorable conditions. *Id.* at para. 7–23.

[126] AR 635–200, para. 14–12*c*.

[127] *Id.* at para. 14–12*b*.

[128] *Id.* at para. 14–12*a*.

[129] AR 635–200, ch. 9.

[130] *Id.* at para. 14–12*d*. The separation action must be initiated and processed through the chain of command to the separation authority for appropriate action.

[131] *Id.*

disciplinary infractions and processed as a pattern of misconduct or as minor disciplinary infractions.[132] In the discretion of their commanders, first-time drug offenders in grades E–1 through E–4 may be considered for separation as well.[133]

Acts or patterns of misconduct must be well documented to serve as a basis for separation and, indeed, should be spelled out in detail in the written notice of separation action prepared by the RC commander.[134] The service of an AGR soldier separated for misconduct is normally characterized as having been under other than honorable conditions.[135] Counseling and rehabilitation measures must be taken if separation is for minor disciplinary infractions or a pattern of misconduct. There are no counseling and rehabilitation requirements, however, if the basis for separation for misconduct is the commission of a serious offense or conviction by a civil court.[136]

Separation for misconduct does require the appointment of appointed counsel for consultation and, unless waived by the member, the appointment of appointed counsel for representation and formal action by a separation board.[137] AGR personnel separated for acts or patterns of misconduct are not considered for transfer to the IRR and are, therefore, subject to discharge.[138] In fact, approval of a recommendation that an AGR soldier be separated under other than honorable conditions because of an act or pattern of misconduct will result in the member being both reduced to pay grade E–1 and discharged.[139]

Bar to Reenlistment. The bar to reenlistment procedure is a means for denying the privilege of reenlistment to certain categories of personnel. AGR personnel are subject to the same provisions on bar to reenlistment that apply to enlisted reservists not on active duty.[140] It is Army policy that only personnel of high moral character, professional competence, and demonstrated adaptability to the requirements of the professional soldier's moral code are offered the privilege of reenlisting in the USAR and that persons who do not maintain such standards, but whose separation is not appropriate, will be barred from further service.[141] An RC commander may initiate a bar to reenlistment in the case of an AGR soldier against whom separation action was taken which did not result in separation (*e.g.*, in the case of a soldier considered for separation for unsatisfactory performance who was retained).[142] AGR personnel who are untrainable (*i.e.*, require frequent or continual supervision) or unsuitable (*i.e.*, possess habits detrimental to discipline) or who are generally irresponsible towards their military service (*e.g.*, AWOL for periods of up to twenty-four hours, losses of clothing and equipment, substandard personal appearance or hygiene, causes trouble in the civilian community) may be considered for bar to reenlistment.[143]

In preparing a bar to reenlistment (DA Form 4126–R), the RC commander must specify in some detail the basis for his or her recommendation, and the AGR soldier must be given at least thirty days in which to comment.[144] While MUSARC commanders have authority to approve a bar to reenlistment in cases involving enlisted reservists not on active duty and having less than ten years of qualifying service for retirement purposes upon completion of their current enlistments, they have no approval authority with respect to AGR personnel. Rather, approval authority lies with area commanders in all cases involving AGR personnel assigned or attached to USAR units.[145] In the case of an AGR soldier with more than eighteen years of qualifying service for retirement purposes upon completion of his or her current enlistment, the area commander can approve the bar if the soldier's enlistment is extended to the required twenty years of qualifying service for retirement purposes.[146]

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[132] *Id.*

[133] *Id.*

[134] AR 635–200, para. 2–4.

[135] *Id.* at para. 14–3*a*.

[136] *Id.* at para. 14–2*d*.

[137] *Id.* at paras. 2–4*a, e,* 14–17*d*. There is no right to a separation board if the command does not seek on other than honorable discharge where the soldier has under six years active or reserve service. A soldier's failure to respond to the notice of separation action within seven days of receipt constitutes a waiver of various rights, including the right to a hearing before a separation board. *See* AR 635–200, para. 2–4*f*.

[138] *See* AR 635–200, para. 1–36.

[139] AR 140–158, para. 4–46*a*; AR 635–200, para. 14–3*a*.

[140] *See* AR 140–111, para. 8–6, referring to chapter I, section VII thereof (paras. 1–27 through 1–33). Similar provisions apply to AC personnel assigned or attached to USAR units. *See* AR 601–280, Personnel Procurement—Army Reenlistment Program, ch. 6 (5 Jul. 1984) [hereinafter cited as AR 601–280]. The only significant differences lie in the period of time the member has to comment on the bar proposed by the RC commander and the authority to approve the bar. *See infra* notes 144, 145.

[141] AR 140–111, para. 1–28.

[142] *Id.* at para. 1–29*d*(1).

[143] *Id.* at para. 1–30.

[144] *Id.* at para. 1–31*b, c*. For AC personnel assigned or attached to USAR units, the soldier's period for reply is only 15 days. *See* AR 601–280, para. 6–5*b*(4). There are some restrictions on the initiation of bars to reenlistment. *See* AR 140–111, para. 1–29*e*. Thus, a bar to reenlistment will not normally be initiated during the first 90 days that an AGR soldier is assigned to a new command or during the last 90 days before transfer from the command or discharge. If a bar is initiated during the last 90 days before transfer or discharge, the RC unit commander must explain on DA Form 4126–R why the bar was not initiated earlier.

[145] *See* AR 140–111, para. 1–31*a*, table 1-1 (Rules A, C). In practical terms, a year of qualifying service for retirement purposes is each one-year period during which an enlisted reservist or AGR soldier has been credited with 50 retirement points. *See* 10 U.S.C. § 1332(a)(2) (1982); Dep't of Army, Reg. No. 135–180, Army National Guard and Army Reserve—Qualifying Service for Retired Pay Nonregular Service, paras. 2–8, 2–10*b* (22 Aug. 74). For AC personnel assigned or attached to USAR units, authority to approve a bar to reenlistment lies through the supporting active Army installation for disciplinary purposes. *See* AR 601–280, para. 6–5*d*.

[146] AR 140–111, paras. 1-29*f*, 1–31*a*, table 1–1 (Rule B, n.2).

Once a bar to reenlistment is approved with respect to a particular AGR soldier, it must be reviewed by the RC unit commander at six-month intervals and prior to completion of the soldier's current term of service or assignment to another unit.[147] It is within the RC commander's power to recommend the removal of an approved bar to reenlistment if the soldier's improved performance should so warrant, but removal of the bar requires approval at the same level as was required for initial approval of the bar, namely, by the area commander.[148]

V. Conclusion

From the survey and brief analysis of the options available to RC commanders in dealing with offenses and disciplinary problems involving AGR personnel, it is clear that RC commanders are far from powerless to deal with the full range of problems that can arise. Many of the procedures and options are the same as or analogous to those available in dealing with the misconduct of USAR enlisted personnel generally. With respect to problems that must be disposed of under the UCMJ, however, RC commanders must reorient their thinking somewhat.

Most disciplinary problems can be handled effectively by employing nonpunitive disciplinary measures and good leadership principles. If an offense is not a purely military offense and too serious to warrant being disposed of by the imposition of nonjudicial punishment, and if it occurred at a location not subject to exclusive federal legislative jurisdiction, there is the option of referring the matter to state or local law enforcement authorities who are willing to accept jurisdiction. If an offense warrants nonjudicial punishment or trial by court-martial, the matter must be referred to the supporting active Army installation for disciplinary purposes set forth in the soldier's order to active duty. There are also a number of administrative alternatives to or supplementing the exercise of UCMJ jurisdiction. With respect to the administrative separation of AGR personnel for cause (*e.g.*, unsatisfactory performance or misconduct), RC commanders must become familiar with the procedures in AR 635–200 which, with minor but important differences, closely approximate the procedures for separating USAR enlisted personnel under AR 135–178. The principal difference is that the separation authority for AGR personnel is at the supporting active Army installation, rather than the area commander.

The role of the MUSARC staff judge advocate in this process cannot be overemphasized. Reserve judge advocates must become familiar with the procedural nuances involved in dealing with disciplinary problems involving AGR personnel, and they must expand their legal expertise to deal with this new set of problems. Difficulties in dealing with AGR disciplinary problems are frequently the result of no involvement by the MUSARC staff judge advocate due to lack of consultation by RC commanders or inadequate coordination with the supporting active Army installation for disciplinary purposes by the MUSARC staff judge advocate. The reserve judge advocate, principally the MUSARC staff judge advocate, is the glue that holds the entire process together. RC commanders must consult their judge advocates, and reserve judge advocates must play an active role in the process from the discovery of an AGR disciplinary problem until its conclusion, whether that is at the MUSARC headquarters or at the supporting active Army installation for disciplinary purposes.

It has been suggested that procedural difficulties might be alleviated if RC commanders not on active duty were given authority to impose nonjudicial punishment on and to prefer charges against AGR personnel so that only cases requiring trial by court-martial would have to be referred to the supporting active Army installation.[149] New legislation is the only method by which this could be accomplished. Such a proposal would have to be "referred for evaluation by the Joint Service Committee on Military Justice, staffed with all services, approved by the Code Committee and be supported by [Department of Defense], Department of Transportation, [Office of Management of the Budget] and Department of Justice,"[150] a formidable set of hurdles for such a proposal to clear.

The problem may, however, be overtaken by events. The various services have been far from uniform in implementing permissive jurisdiction under UCMJ art. 2(a)(3) over reserve personnel during inactive duty training (IDT).[151] In a year-end report for 1984, the Assistant Secretary of Defense for Reserve Affairs reacted as follows to the 1984 decision by the Court of Military Appeals in *United States v. Caputo*,[152] dismissing charges against a naval reservist who was charged after the conclusion of AT with an offense committed while on AT:

> In view of the *Caputo* decision, we have been preparing a legislative proposal to clarify the intent of Congress concerning applications of the UCMJ to reserve components. We believe it is essential that the reserve components, which are now considered available for immediate mobilization, are subject to the same disciplinary standards as the active forces.[153]

If such a change should occur, RC commanders would in all likelihood acquire UCMJ jurisdiction over AGR personnel at the same time they acquire it over USAR enlisted personnel generally. Until or unless such legislative changes are enacted, currently available options and procedures should be mastered and employed with maximum effect. Ultimately, of course, none of the available options and procedures is a substitute for good leadership at all levels of command.

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[147] *Id.* at para. 1–32*c*.

[148] *Id.* at para. 1–32*d*(1).

[149] Report of Army Reserve Forces Policy Committee Work Group on AGR Discipline, Recommendation 9 (Sep. 1984).

[150] DAJA–CL 1984/5645, para. 2, 9 May 1984.

[151] *See* Baldwin & McMenis (1984), *supra* note 7, at 21–25.

[152] 18 M.J. 259 (C.M.A. 1984).

[153] Office of the Assistant Secretary of Defense (Reserve Affairs), End of Year Report 1984, at 13.

The Right To Be Free From Pretrial Punishment

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Introduction

The history of American military justice and the Uniform Code of Military Justice[1] makes clear that a soldier may be held in confinement before trial by court-martial, but may not be punished by having to perform "hard labor" before conviction and sentencing. Remarkably, litigation concerning the denial of the right to be free from pretrial punishment has not produced much military case law. But the most recent decision addressing this issue, *United States v. Palmiter,*[2] has interjected several potential problems that must be understood by commanders, military magistrates, judges, and by counsel who represent both the government and accused in courts-martial.[3] The purpose of this article is to help further that necessary understanding.

It may be helpful to consider first the development of the prohibition against pretrial punishment in the military. The obvious constitutional underpinnings in the due process clause scarcely need to be mentioned.[4] In *Palmiter,* the lead opinion by Judge Cox referred to this history in concluding that there was "a clear intent to prohibit punishment by the imposition of hard labor upon a pretrial confinee."[5] In reaching this conclusion, the court relied on such observations as "[n]either hard labor nor severe service should be exacted of a soldier while remaining in arrest" and "[e]nlisted men in confinement awaiting trial or sentence should not be assimilated in their treatment to those under sentence, or required to perform labor with them."[6]

The right to be free from pretrial punishment was first enforced by the United States Court of Military Appeals in *United States v. Bayhand.*[7] Bayhand was a pretrial confinee assigned to work details with adjudged and sentenced prisoners. The work included pick and shovel manual labor as well as quarry work. Bayhand refused to obey orders relating to the assigned work and was convicted of willful disobedience offenses. On appeal, the orders were held to be illegal. The Court of Military Appeals concluded that the conditions of Bayhand's pretrial confinement were indistinguishable from the circumstances of sentenced prisoners. Because his treatment violated Article 13, UCMJ,[8] he was legally entitled to disobey the orders.

No doubt the work Bayhand was ordered to do was truly "hard labor." But as penology and correctional processes evolved, the nature of the work imposed became legally less significant.[9] In *United States v. Pringle*[10] and *United States v. Nelson,*[11] the Court of Military Appeals ceased to inquire into the nature of the work assigned to pretrial confinees. The test applied in those cases was one of commingling. If pretrial confinees and sentenced prisoners were working at the same tasks together, *i.e.,* commingled, then the pretrial confinee was as a matter of law performing hard labor in violation of Article 13.

United States v. Palmiter

As a consequence of neglectfully missing the movement of his ship and a nine month unauthorized absence, U.S. Navy Airman Palmiter found himself in pretrial confinement, first on board the aircraft carrier *U.S.S. Coral Sea* and later at the naval station brig on Treasure Island in California. His initial treatment in pretrial confinement was characterized by the Court of Military Appeals as "stark" and "onerous."[12] Two days later, Palmiter was allowed to join the general population of the confinement facility after he executed a "Work Program Request."[13] This document amounted to a request to be commingled for "formations, meals, classroom instruction, and routine details." The form noted that the pretrial confinee would not be assigned

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[1] 10 U.S.C. §§ 801–940 (1982) [hereinafter cited as UCMJ].

[2] 20 M.J. 90 (C.M.A. 1985). For an excellent article on pretrial restraint under the new Manual for Courts-Martial, *see* Finnegan, *Pretrial Restraint and Pretrial Confinement,* The Army Lawyer, Mar. 1985, at 15.

[3] *See Palmiter,* 20 M.J. at 93 n.4.

[4] "For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell v. Wolfish, 441 U.S. 520, 535 (1979) (footnote omitted). *See also* Block v Rutherford, 104 S. Ct. 3227, 3231 (1984).

[5] 20 M.J. at 93–94.

[6] W. Winthrop, Military Law and Precedents 125 (2d ed. 1920 Reprint).

[7] 6 C.M.A. 762, 21 C.M.R. 84 (1956).

[8] The current text of the statute is as follows:
No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.
The original text is substantially similar in all material parts and is quoted in full in the *Bayhand* opinion.

[9] As we shall see below, especially when we examine Chief Judge Everett's concurring opinion in *Palmiter,* 20 M.J. at 97–101, the arduous nature of the work assigned is not legally determinative of what hard labor is for the purposes of punishment. Nonetheless, the nature of the task of "making little ones out of big ones" or in the euphemistic Southern phrase, "playing rock-hockey in Atlanta," remains a consideration in determining whether assigned work duties are punitive. *See Palmiter,* 20 M.J. at 94 n.6.

[10] 19 C.M.A. 324, 41 C.M.R. 324 (1970).

[11] 18 C.M.A. 177, 39 C.M.R. 177 (1969).

[12] *Palmiter,* 20 M.J. at 92 n.2, 99.

[13] *Id.* at 93.

to "hard labor" details with sentenced prisoners. Pursuant to his work program request, Palmiter performed routine maintenance functions around the confinement facility during normal duty hours in accordance with service policy. He was housed with and uniformed similarly to the sentenced prisoners in the confinement facility. At trial and on appeal, Palmiter challenged the legality of his being commingled with sentenced prisoners while in pretrial confinement.[14] He claimed his request was not truly voluntary because the only other option was a form of administrative segregation which amounted to solitary confinement. The Court of Military Appeals granted his petition for review,[15] but in disposing of the case the court has raised more issues than it has resolved.

Palmiter was not required to perform any hard labor, but he was obviously commingled, albeit at his request. If Palmiter's claim that his request was involuntary was valid, then under *Nelson* and *Pringle* he suffered illegal pretrial punishment. But commingling has proven to be an unsatisfactory test as well. This is in large measure because it is important to have pretrial confinees perform work details within the confinement facility and also to have reasonable access to the educational and recreational programs available in the confinement facility. To accomplish these goals, some commingling of pretrial confinees and sentenced prisoners is inevitable in even the most modern, fully-staffed, confinement facility. To deny pretrial confinees access to these beneficial programs and meaningful activities, solely in the name of avoiding commingling, is both a waste of resources and an unnecessary harshening of the conditions of pretrial confinement.[16] Accordingly, in *Palmiter,* the court rejected an inflexible application of the commingling test.

In its place, Judge Cox would substitute the analysis employed by the United States Supreme Court in *Bell v. Wolfish.*[17] There the Court concluded that the determination of whether the conditions of pretrial confinement amounted to illegal pretrial punishment turns on the intent of the government in imposing the conditions. The intent to punish is, in turn, measured by considering "the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate government objective.' "[18] Applying the circumstances of Palmiter's pretrial confinement to this test,[19] Judge Cox found no intent to punish. Moreover, because commingling was not punishment *per se,* at least in Judge Cox's view, Palmiter's rights under Article 13 were not violated and no relief was warranted.

In his separate opinion concurring in the result of Judge Cox's lead opinion, Chief Judge Everett took a much broader view of the protections of Article 13. The Chief Judge concluded that involuntary commingling of different classes of prisoners would tend to stigmatize the less culpable, and the deliberate creation of this stigmatizing effect was a form of punishment which violates Article 13.[20] Thus, for the Chief Judge, involuntary commingling was punishment *per se* in violation of Article 13. But this conclusion does not mean that the military pretrial confinement process must reject the "intent to punish" test of *Wolfish.* Indeed, in his concurring opinion, the Chief Judge fully described the "intent to punish" analysis of *Wolfish.* He approved the process of determining whether a condition or restriction in pretrial confinement was reasonably related to any legitimate governmental objective. But when he applied that standard to Palmiter's conditions of pretrial confinement, the Chief Judge found several violations of Article 13.[21] While Palmiter was, therefore, illegally punished, the Chief Judge did not find the brief imposition of impermissible conditions to merit such relief as would justify setting aside the sentence and remanding for reassessment. Accordingly, he concurred in the result which affirmed Palmiter's conviction and sentence as affirmed by the United States Navy and Marine Corps Court of Military Review.[22]

Waiver

The judges obviously differed on the precise scope of protection afforded under Article 13, and on how to test for a violation of that article. But that was not the end of their differences. Whether a pretrial confinee may waive the protection of Article 13 was also at issue. Here again there is a scant history of previous case law which addresses the legal question. There is also a practical issue, because at most military confinement facilities pretrial confinees routinely have been offered an opportunity to execute what amounts to a waiver of the provisions of Article 13 in order to be allowed to participate in activities with the general population of the confinement facility.

Before *Palmiter,* the lead case on the issue was *United States v. Bruce.*[23] In this case an Air Force enlisted member had been confined before trial in an Army confinement facility. Bruce accepted treatment similar to that of sentenced prisoners in order to enjoy the benefits available to sentenced prisoners in the facility. Judge Fletcher wrote the opinion for the court. He found in Article 13 no express

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[14] *Id.* at 92.

[15] United States v. Palmiter, 16 M.J. 139 (C.M.A. 1983).

[16] *See Palmiter,* 20 M.J. at 94.

[17] 441 U.S. 520 (1979).

[18] *Palmiter,* 20 M.J. at 95 (quoting Bell v. Wolfish, 441 U.S. at 539).

[19] Judge Cox stated the test as follows: "[T]he question to be resolved is not solely whether a pretrial confinee was commingled with sentenced prisoners, but, instead, whether any condition of his confinement was intended to be punishment." 20 M.J. at 95.

[20] *Id.* at 98 (Everett, C.J., concurring). The Chief Judge's analysis extends the commingling theory by analogizing it to the prohibition against placing American soldier-prisoners "in immediate association" with enemy prisoners in violation of Article 12, UCMJ. Of course, Article 12, in part, reflects the prohibition of Article 97, Geneva Convention Relative to the Treatment of Prisoners of War (1949), which precludes placing prisoners of war in detention with ordinary criminals.

[21] Specifically, the Chief Judge concluded that requiring a pretrial confinee to only wear undershorts, to only sit at a desk or stand in his cell between the hours of 0400 and 2200, and not to correspond with persons outside the facility were violations of Article 13 under the *Wolfish* analysis.

[22] 20 M.J. at 100–01.

[23] 14 M.J. 254 (C.M.A. 1982).

provision for a waiver of the protections of the statute. Accordingly, its protections were not waivable. Chief Judge Everett concurred in this conclusion.

The Chief Judge later wrote in *Palmiter:*

> [A]lthough in my view, Article 13 generally prohibits commingling pretrial detainees with sentenced prisoners, I see no reason to conclude that an accused cannot waive this protection. Article 13 contains no explicit provision for waiver, *see United States v. Bruce,* 14 M.J. 254 (C.M.A. 1982); but it also does not reveal any legislative intent to prohibit a waiver of the rights bestowed. Indeed, if a servicemember or other citizen can waive some of his most important constitutional rights—such as confrontation and the presumption of innocence—why should he be precluded from waiving his Article 13 protection?[24]

This switch in position is easily justified by the benefits to be gained by the accused who has the option to waive the protections of Article 13. The Chief Judge did, however, include a caution that confinement facilities must not institute such "unduly onerous" pretrial confinement conditions as would coerce a waiver of the Article 13 right from pretrial confinees.[25]

Judge Cox, without citing *Bruce,* concluded that "a prisoner cannot 'waive' his Article 13 protections prior to trial."[26] His rationale, without citing precedent, was that "no one can consent to be treated in an illegal manner."[27] It is not necessary to address this rationale as Judge Cox found that the "Work Program Request" that Palmiter executed before his release into the general population of the confinement facility was not a waiver of Article 13 protections.[28]

Regrettably, the split between the two judges leaves unresolved the issue of whether the protections of Article 13 may be waived. Judge Cox rejected the waiver theory but did not see commingling as a *per se* statutory violation. Chief Judge Everett endorsed the waiver concept. Thus, the net effect of *Palmiter* is to legitimatize the practice of allowing pretrial confinees to mix with the general population of sentenced prisoners in a confinement facility after executing a "request" to do so.

Judicial Review

There is another potential problem to consider in *Palmiter:* the role of the military magistrate in reviewing the conditions of pretrial confinement. In the past, consistent with regulatory guidance, military magistrates at confinement facilities have only performed a review of a commander's determination that a soldier should be placed in pretrial confinement.[29] In *Palmiter,* both Judge Cox and Chief Judge Everett attempt to expand this role by authorizing military magistrates to review allegations that the conditions of pretrial confinement violate Article 13.

Judge Cox's opinion noted that the existence of illegal pretrial conditions is commonly alleged only after the fact. Moreover, soldiers have no civil tort remedy for such illegal treatment,[30] much less any judicial forum in which to bring the claim for relief. Judge Cox would thrust the military magistrate into this hiatus. "The military magistrate systems created by the services in response to *Courtney v. Williams,* [1 M.J. 267 (C.M.A. 1976)] are ideally suited to review the conditions of pretrial confinement as well as the need for pretrial confinement at the same hearing."[31] The military magistrate was also given specific guidance for performing this reviewing function. In addition to the considerations arising out of *Bayhand* and *Nelson* (nature of treatment as compared to sentenced prisoners and whether prisoners are commingled), Judge Cox advised magistrates to consider the physical circumstances of the confinement facility, the overall prisoner population and demographics, the "actual ability" of the confinement facility to mix or segregate prisoners, and the "impact" of segregation of pretrial confinees from the general facility population.[32]

In considering the role of the military magistrate, Chief Judge Everett agreed with the foregoing, at least to the extent that magistrates have the power "to determine whether impermissible conditions of confinement have been imposed."[33] Judge Cox went several steps further and foresaw a complete review structure for the issue. The pretrial confinee "who believes that he is being punished by conditions in the confinement facility"[34] may seek relief from the magistrate. Failing there, the pretrial confinee may "appeal to the convening authority or to the military judge depending

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[24] *Palmiter,* 20 M.J. at 100 (Everett, C.J., concurring).

[25] *Id.*

[26] *Id.* at 96.

[27] *Id.* This argument seems insubstantial. One may consent to an assault (6 Am. Jur. 2d, *Assault and Battery* § 66 (1963)), a search that violates the fourth amendment (*see, e.g.,* United States v. Nicholson, 1 M.J. 616 (A.C.M.R. 1975)), or a deprivation of fifth amendment protections (*see, e.g.,* North Carolina v. Butler, 441 U.S. 369 (1979)). It should be noted, of course, that the waiver issue was not central to Judge Cox's resolution of the case.

[28] 20 M.J. at 96.

[29] *See* Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 9-3*a* (1 Aug. 1984) [hereinafter cited as AR 27-10]. Additionally, military magistrates are authorized to issue authorizations to search, seize, or apprehend.

[30] *See* Chappell v. Wallace, 462 U.S. 296 (1983); *cf.* Feres v. United States, 340 U.S. 135 (1950). This is not to say soldiers are without a remedy. The commander of the confinement facility or the soldier's unit commander may be petitioned under Article 138, UCMJ. Postreferral, any issue may be brought before the military judge. The Army Inspector General system is also available for relief.

[31] 20 M.J. at 96.

[32] *Id.* at 96–97. In this regard, a magistrate must also consider the additional guidance provided by footnote 11 of the opinion (segregation of pretrial confinees could be a *per se* violation of Article 13) and footnote 2 in Chief Judge Everett's concurring opinion ("courts should ordinarily defer" to the professional judgment of corrections officials).

[33] *Palmiter,* 20 M.J. at 97 (Everett, C.J., concurring).

[34] *Id.* This is Judge Cox's formulation. In the Chief Judge's words: a soldier "in pretrial confinement who believes the conditions are unduly onerous." *Id.* (Everett, C.J., concurring).

on the state of the proceedings at the time."[35] Judge Cox's reading of what is now paragraph 9–4*b* of AR 27–10, led him to conclude that the supervising military judge may review a magistrate's determination of this issue even before the underlying charges are referred to a court-martial and the judge is detailed to the trial of the case.[36] Of course, the issue may then be reviewed at trial and on any appeal that may follow. Finally, a petition for extraordinary relief may be authorized to seek relief from a violation of Article 13.

Two points must be made in connection with this envisioned appellate structure. First, the burden is on the confinee to raise the issue in a timely fashion. "The failure to raise this issue while undergoing pretrial confinement will be strong evidence that the confinee was not illegally punished prior to trial."[37] Second, the specific extent or nature of the relief available to be ordered by the magistrate or another judicial officer or court of review is unclear. Magistrates and others are clearly able to order release from pretrial confinement.[38] Likewise, administrative credit for illegal pretrial confinement may be an appropriate remedy.[39] On appeal, sentence reassessment by the Army Court of Military review may also be appropriate.[40] Logically, the proper remedy would be to order abatement of the illegal condition(s). Immediately, difficult questions come to mind about judicial interference with the commander's prerogative to allocate scarce resources within the command and the enforcement of judicially mandated procedures and remedies.[41] In the civilian sector, we are very familiar with the concept of correctional systems being "run" by judges under injunctive and mandamus powers. Such a scenario is anomalous in military service. Fortunately, a solution exists. In place of what Judge Cox foresees as a judicial appeals process, the government could provide a system of command-directed remedies and enforcement should they ever be needed. This process could be initiated by the report of specific findings by a judicial officer.[42]

As an interim step, the U.S. Army Trial Judiciary has published Trial Judiciary Memorandum 85–1—Review of Pretrial Confinement, dated 21 June 1985. In it, military magistrates are advised that *Palmiter* does not expand their regulatory authority in the review of pretrial confinement. If an issue concerning the conditions of pretrial confinement is raised, magistrates are told to refer the complainant to the appropriate commander, or, if post-referral, to the detailed military judge. Any *sua sponte* concerns with the conditions of pretrial confinement are to be referred to appropriate command channels. Ultimately, as suggested above, specific regulatory guidance should be given to magistrates on how to address these issues, because it is foreseeable under *Palmiter* that a magistrate who fails to intercede and correct a violation of Article 13 may be ordered to do so by the Court of Military Appeals as a remedy in an extraordinary writ petition disposition. The Army would be served better by providing command-directed procedures in lieu of *ad hoc* processes.

As noted above, prepositioned Army policy guidance for magistrates, judges, and confinement facility and other commanders is the best remedy for any future issues that arise concerning allegations of illegal conditions in pretrial confinement. But this does not absolve the Court of Military Appeals from its culpability for creating potential new problems. In the first instance, the proposed extensive judicial role of the military magistrate and military judge before referral to trial is pure dictum as it was not necessary to resolve the case. Moreover, it is inconsistent with the military commander's responsibility for the operation of a unit and the accomplishment of a mission, here confinement of military personnel. Furthermore, in creating judicially managed review procedures, Judge Cox's opinion does not even pay lipservice to the salutary caution of the United States Supreme Court that the specific conditions of confinement "are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgement in such matters."[43]

These criticisms of the *Palmiter* opinions must be balanced against the important practical aspects of the case. Both judges were concerned about protecting the legitimate interests of pretrial confinees, thereby protecting the integrity of the military justice system.[44] They both recognized

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[35] *Id.* The opinion does not explain which option follows which particular state of the proceedings. *See* the discussion of Trial Judiciary Memorandum 85–1, *infra*, for specific guidance.

[36] This conclusion, beyond its implications of expanded judicial power and judicial authority totally independent of the convening authority, is incongruous in light of the prereferral nonappealability of the magistrate's decision to continue or terminate pretrial confinement. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(j) [hereinafter cited as R.C.M.]. *See* AR 27–10, para. 9–5*b*(1).

[37] *Palmiter*, 20 M.J. at 97.

[38] R.C.M. 305(i)(5) and (j)(1); AR 27–10, para. 9–5*a*(1); *see* United States v. Berta, 9 M.J. 390 (C.M.A. 1980).

[39] United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983).

[40] United States v. Martinez, 19 M.J. 744, 747 (A.C.M.R. 1984).

[41] *See id.* at 747 n.3 (*Martinez* involved conditions of post-trial confinement, but the Army Court of Military Review extended it to pretrial confinement in United States v. Gregory SPCM 21274, slip op. at 4 n.7 (A.C.M.R. 6 January 1986)).

[42] The process could work as follows: A pretrial confinee makes an allegation of an illegal condition of confinement in violation of Article 13 to the magistrate. The magistrate is empowered to hold a hearing and enter findings. The confinee and the government may appear and participate in this process. If the allegation is substantiated, the confinement facility commander or, if appropriate, a higher echelon commander, is given a report of the allegation and findings. The magistrate is authorized to *recommend* corrective action. The regulation directs the commander to ensure the illegal condition terminates as soon as practicable and requires that a report of the steps taken be forwarded to both the magistrate and a higher headquarters. This process ensures a neutral review of the allegation, retains command control over the action, preserves the confinees' record of complaint, keeps the legal remedy before the judge of a court-martial duly authorized to participate in the accused's trial, and allows sufficient external command review to ensure that problems are not merely papered over. The process could be based on guidance concerning pretrial confinement contained in AR 27–10, ch. 9, and Dep't of Army, Reg. No. 190–47, Military Police—United States Army Correctional System, para. 4–4 (1 Nov. 1980).

[43] Pell v. Procunier, 417 U.S. 817, 827 (1974). The Chief Judge noted this caution in his concurring opinion in a different context. 20 M.J. at 100 n.2 (Everett, C.J., concurring).

[44] *See* United States v. Johnson, 21 M.J. 211, 216 (C.M.A. 1986) (Cox J., concurring in the result).

that the military magistrate, having performed duty at the confinement facility over time, will be more familiar with the actual conditions that prevail there than an appellate judge reviewing a record months later. As a factfinder on the scene and as one who knows about the facilities, the military magistrate will be able to evaluate better whether there is a violation of Article 13 or a valid waiver of the statutory protection. This inquiry is important under the logic of either opinion. Under Judge Cox's view, the magistrate's inquiry is a crucial opportunity to make a record because he noted that the failure to raise the issue of a violation of Article 13 while actually undergoing pretrial confinement would be strong evidence that there was no illegal punishment prior to trial.[45] Under the Chief Judge's view, a contemporaneous judicial inquiry into the existence of a valid waiver would ordinarily resolve the issue. Notwithstanding the intent that *Palmiter* present a practical approach to the issue of illegal pretrial punishment, it is, as a matter of policy, a potentially troublesome interjection of judicial authority into a military commander's realm of responsibility.

Conclusion

In addition to its legal consequences, the *Palmiter* case illustrates several of the current trends from the bench of the United States Court of Military Appeals. As they did in *Palmiter,* the two judges tend to be able to agree on dispositions of cases even though their analytical approach to the supporting legal rationale is inconsistent.[46] Their proper concern that their separate analyses are clearly recorded in separate opinions is also a marked tendency. The Chief Judge's willingness to silently disagree with (to the point of overruling) prior cases is illustrated by his treatment of *Bruce.* Judge Cox's penchant to provide practitioners with an analytical framework for resolving an issue is illustrated by the enumeration of the various factors a judicial officer might consider in reviewing an alleged violation of Article 13. The opinion, perhaps most significantly, shows the tendency of the current court to "judicialize" the military justice system. The proposed expansion of the powers of military magistrates as well as military judges is fully consistent with powers of judicial officials outside the military justice system. Finally, the regrettable tendency to resolve cases without any majority view of the whole issue, which is inevitable on a two-judge court, often leaves practitioners without clear guidance. This last circumstance should prompt careful study of the opinions and more implementing guidance from command sources.

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[45] *Palmiter,* 20 M.J. at 97.

[46] *See, e.g.,* United States v. Baba, 21 M.J. 76 (C.M.A. 1985) (multiplicity); United States v. Reeves, 20 M.J. 234 (C.M.A. 1985) (fifth amendment issue); United States v. Shields, 20 M.J. 174 (C.M.A. 1985) (character evidence); Harrison v. United States, 20 M.J. 55 (C.M.A. 1985) (evidence on reconsideration).

Automation of The Judge Advocate General's School*

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In May 1983, The Judge Advocate General's School, "Home of The Army Lawyer," became one of the first Army JAG Corps activities to install and utilize a mainframe computer system for its day-to-day operations. This became possible after a lengthy procurement process which began back in January 1982. When I arrived at TJAGSA in August 1982, it became my responsibility "to bring TJAGSA out of the Dark Ages and into the Twentieth Century." As we face 1986 and beyond, TJAGSA remains fully committed to the task of automation, and we are expanding our use of computers into all of the functional areas of TJAGSA. In this article I will inform you of where we are today and where we are going to be in the future.

The automation mission at TJAGSA addresses three major areas: student training, instructor workstations, and support operations. This article will discuss all three areas and explain how they fit the overall automation plan for TJAGSA.

Student Training

Student training is presently limited to members of the graduate course. They currently receive ten hours of instruction in the use of personal computers and computer terminals. They are also trained in the use of automated legal research services such as WESTLAW and LEXIS. This training is primarily conducted off-site due to lack of sufficient TJAGSA computer terminals to handle the current student population. The University of Virginia's academic computing center provides us with a room where we can give the students hands-on training. Presently only ten percent of the students have had hands-on experience with a computer or other automation equipment prior to attending the graduate course. Thus one of the major training objectives is to allay any fears and show the student that there are numerous areas where a computer can provide assistance in a typical staff judge advocate's office.

With the expansion of TJAGSA in 1988, we will be opening a computer learning center where computer equipment, similar to that found in an SJA office, will be available for training and use by any student assigned to TJAGSA. This learning center will feature either an IBM PC or IBM PC compatible computer, as well as computer terminals that will operate off of our current mainframe computer system (JAGTRON). We plan to use these machines to access other data bases, like SIDPERS, and support programs such as automated legal research services. This facility will be used for refresher training as well as for assisting students in completing their theses and research papers. The potential of this facility is unlimited and its use will be a must for a JAG officer to remain current with the automation efforts of the Judge Advocate General's Corps and the Army.

Instructor Workstations

The second area of automation emphasis is the Instructor/Attorney Workstation. In this area we hope to provide JAG officers with the very latest information in military law. Presently, instructors are using personal computers to prepare teaching notes, outlines, articles, deskbooks, and chapters for various Department of the Army pamphlets. Each teaching division of the academic department has access to one or more personal computers. While some instructors are still using the word processing center staff to complete their teaching notes, articles, deskbooks, and DA pamphlets, it is now possible to convert textual information prepared by the word processing center to a smaller floppy disk using the KEYWORD 7000 system. This system can convert information from an 8" disk to a 5¼" disk and vice versa. The documents then can be transferred between the personal computer and the word processing center for editing, rewriting or revision. Our long term goal is to provide each instructor with his or her own desktop attorney workstation. Through the use of these attorney workstations, our instructors will be able to remain current in their assigned subject matter areas and integrate new material into courses of instruction and DA and TJAGSA publications much more quickly.

Support Services

The support services area has received the most attention at the School. The School's support mission is a heavy task due to the number of students we support either through resident or nonresident instruction. We have automated most of the support areas and will continue to develop these areas as new ideas and information become available. These areas include: the Academic Records Section; the Guard and Reserve Affairs Department; the Adjutant's Office; the Logistics Office; the Army Law Library Service (ALLS); the Publications Office (*The Army Lawyer* and the *Military Law Review*); the Media Services Office; the Post Judge Advocate's Office; the Operations Officer; the Automation Management Office; the Legal Assistance Branch; the support staff of each teaching division (Administrative and Civil Law, Criminal Law, Contract Law, and International Law); and a quota management system for the Continuing Legal Education Office of the Nonresident Instruction Branch. We are continuing our efforts to automate the correspondence course program and plan to automate some of the library functions in the future.

Within the Academic Records Section, we have automated the student academic records of the resident graduate and basic course students. We currently have an on-line capability to retrieve student grades from every graduate and basic course held at TJAGSA. When we are finished in this area, we hope to be able to maintain a student profile on any individual who has received any instruction at TJAGSA. This profile will indicate what

*Third in a series of articles discussing automation. This series began in the January 1986 issue of *The Army Lawyer*.

courses he or she has taken and the dates they attended those courses.

The Guard and Reserve Affairs Department is in receipt of personnel information from both the National Guard Bureau and the Reserve Component Personnel Center. This information is used to manage the careers of Guard and Reserve personnel.

The Adjutant's Office has the ability to manage the personnel records of the members of the staff and faculty as well as the graduate and basic course students.

The Logistics Office is now operating under an automated budget program that allows any manager to determine the actual status of his or her budget for operational purposes and keeps the budget for the School. Among the tangible benefits by this area are the automation of routine purchase orders for all areas within the School, and, for the billeting office, automating the statement of non-availability process for personnel attending instruction at TJAGSA in a temporary duty status.

The Army Law Library Service (ALLS) was the first area converted to the School's new computer. ALLS manages 260 Army law libraries. Automation has greatly increased ALLS' ability to respond to the needs of the libraries by automating procurement of materials, a list of publishers, a list of publications, and, in the near future, inventory information regarding the libraries.

Automation has provided the Publications Office with the ability to electronically edit new articles submitted for publication, transmit the entire publication electronically, and maintain historical indices.

The Media Services Office has the ability to generate computer graphics for video productions, 35mm slides, and viewgraphs. Use of a personal computer has streamlined the management of this office by maintaining workorder logs, a complete video tape library catalogue, and production schedule records.

The Post Judge Advocate's Office is testing an automated will package developed by JAG officers and is preparing to use other packages such as promissory notes, powers of attorney, and guardianship, real estate agreements, and tax preparation packages to support its mission.

The Legal Assistance Branch of the Administrative and Civil Law Division maintains legal assistance statistics for every legal assistance office world-wide. Additionally, they are helping develop prototype software in the areas of wills and powers of attorney.

The automation of the support staff areas within the teaching divisions has accelerated the flow of information within the academic department as well as responses to outside activities and agencies.

By developing an on-line quota management system for CLE courses, we are now able to quickly monitor quotas for each course and determine when and were vacancies exist. This course management program has been in place since April 1985 and has been used extensively to monitor the Senior Officers Legal Orientation Courses.

Presently, we are in the final stages of completing all the necessary programs for the Correspondence Course Office. We plan to have this last major area on-line by June 1986. Written notice will be given when individual subjects/courses are converted to the automated system.

Conclusion

There is no simple solution to the automation of any organization or office, especially with the changing times being experienced by the automation industry and the Army. I am determined to use automation for the betterment of TJAGSA, and, by doing so, assist in fulfilling TJAGSA's mission so that it will continue to be a leader in the overall automation efforts of the Office of The Judge Advocate General and the Judge Advocate General's Corps.

USALSA Report

U.S. Army Legal Services Agency

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Using Tax Information in the Investigation of Nontax Crimes

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This article is the first in a series of articles TCAP plans to provide in the area of "economic crimes." Because recent inquiries submitted to TCAP reveal that economic crimes are presenting some of the most difficult problems for trial counsel, TCAP intends to present a comprehensive view of investigational avenues trial counsel may pursue to successfully prosecute accused who become involved in complex cases involving fraud against the government.

One of the more controversial issues of modern tax administration is the use of federal income tax information in the investigation and prosecution of nontax crimes.[1] Access to and use of this information is generally acknowledged by law enforcement experts as extremely important to government efforts to control a wide variety of nontax crimes;[2] particularly the more subtle and elusive forms of criminal activity such as white collar crime, drug trafficking, public corruption, and organized crime.[3] Conversely, wide scale distribution of income tax information, even within federal agencies, has been criticized as impinging taxpayers' rights to privacy and as endangering the effective collection of tax

*This article was originally submitted in partial satisfaction of the requirements for the Masters of Law in Taxation program at Georgetown University.

[1] *See generally* Comment, *Raiding the Confessional—The Use of Income Tax returns in Nontax Criminal Investigations,* 48 Fordham L. Rev. 1251 (1980) [hereinafter referred to as *Raiding the Confessional*] (citing S. Rep. No. 938, 94th Cong., 2d Sess. 317 [hereinafter cited as Senate Report], *reprinted in* 1976 U.S. Code Cong. & Ad. News 3437, 3746–47).

[2] For examples of the use of tax records in the prosecution of nontax crimes, *see* United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) (commodity fraud); Davidson v. Brady, 559 F. Supp. 456 (D. Mich. 1983) (conspiracy to defraud); *In re* Cruz, 561 F. Supp. 1042 (D. Conn. 1983) (arson); *In re* Grand Jury Empanelled January 21, 1981, 535 F. Supp. 537 (D.N.J. 1982) (local racketeering).

[3] *See* New York State Dep't of Taxation & Fin. v. New York State Dep't of Law, 44 N.Y.2d 575, 580, 378 N.E.2d 110, 113, 406 N.Y.S.2d 747, 750 (1978); Senate Report, *supra* note 1, at 317, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3747.

revenues.[4] Recognizing the possible danger that unrestricted access to tax information could pose, both to personal privacy and to the effective administration of the tax collection system, Congress has incorporated into the Internal Revenue Code (the Code) a general rule of confidentiality concerning tax information. This rule is set forth at 26 U.S.C. § 6103 and provides that tax information shall be kept confidential unless specifically authorized for release. Unauthorized release of tax information will render the offending parties subject to both criminal and civil sanctions.[5]

This article will examine the nature and necessity of those procedures which restrict federal and state law enforcement officials' access to income tax information during the investigation of nontax crimes. This discussion will consider the following:

the manner in which the Code defines and classifies tax information within the meaning of its confidentiality provisions;

the restrictions imposed by the general rule of confidentiality and the sanctions that may be imposed for violating its provisions;

the specific procedures for releasing tax information to officials investigating nontax crimes, and a comparison of these procedures with those used to safeguard other types of personal financial information in other federal statutes such as the Right to Financial Privacy Act;[6] and

the effectiveness of the procedural safeguards established by section 6103 in light of alternative investigative techniques available to federal agencies and law enforcement officials.

This presentation will conclude with an analysis of the validity of the public policy considerations that are cited as justification for restricting the access of law enforcement officials to tax information. Finally, the direction in which Congress appears to be moving in resolving the conflicting issues in this area, as indicated by recent changes to the Code confidentially provision, will be discussed.

Defining Tax Information

Tax information is categorized by the Code into two types: tax returns and return information.[7] This latter category is further classified into two subdivisions: taxpayer return information and other than taxpayer return information.[8]

"Tax return" and "return information"[9] are specifically defined in section 6103(b)(1):

> (1) Return. The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, provided for, or permitted under the provisions of this title which is filed with the Secretary by or on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.
>
> (2) Return information. The term "return information" means—
>
> a. A taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, interest, fine, forfeiture, or other imposition, or offense, and,
>
> b. any part of any written determination or any background file document relating to such written determination (as such terms are defined in Section 6110(b) which is not open to public inspection under 6110.
>
> Such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards use or to be used for the selection of returns for examination, or data used or to be use for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

The classification of taxpayer return information and other than taxpayer return information is predicated upon the source of the information. Return information, as defined in section 6103(b)(2), is information furnished to the Internal Revenue Service by or on behalf of the taxpayer to whom such information relates. This category includes information received not only from the taxpayer himself, but also includes information from a taxpayer's agents and representatives such as tax preparers, financial consultants, employers, financial institutions, and trustees, who are required to furnish information to the IRS concerning individual taxpayers. Other than taxpayer return information refers to information obtained from sources other than the taxpayer, his agents, or representatives.[10] This category is obviously more limited and normally arises only in those

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[4] *See* Senate Report, *supra* note 1, at 317, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 3747.

[5] *See* 26 U.S.C. §§ 7213, 7216, and 7431 (1982). *See also infra* notes 68–91 and accompanying text.

[6] 12 U.S.C. § 3401 (1982).

[7] 26 U.S.C. § 6103(b)(1) and (2) (1982).

[8] 26 U.S.C. § 6103(b)(3) (1982).

[9] *See generally* White v. IRS, 707 F.2d 897 (6th Cir. 1983); *In re* Grand Jury Investigation, 688 F.2d 1068 (6th Cir. 1982), *reh'g denied* 696 F.2d 449 (1982); Neufeld v. IRS, 646 F.2d 661 (D.C. Cir. 1981).

[10] *See, e.g.*, Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982).

cases where the IRS conducts an independent investigation.[11]

General Rule of Confidentiality

The general rule of confidentiality concerning tax information is set forth in 26 U.S.C. § 6103a,[12] and prohibits any present or former officer-employee of the United States from disclosing a return or return related information obtained during his or her government service, unless specifically authorized to do so by statute. This provision reads:

> Section 6103. Confidentiality and Disclosure of Returns and Return Information.
>
> General Rule. Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States
>
> (2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (m)(4)(B), or subsection (n), shall disclose any return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee. Other than taxpayer return information refers to information not obtained from the return or from the taxpayer or his representatives.

Section 6103 has been interpreted by the courts as the overriding expression of congressional intent on the guidelines applicable to the release of tax information. In *Zale Corp. v. IRS*,[13] the District Court for the District of Columbia held that conflicts between the disclosure policies of section 6103 and the Freedom of Information Act[14] (FOIA) would be resolved in favor of nondisclosure under section 6103 when access to tax information was sought.[15] A similar decision was reached in *White v. IRS*,[16] where the District Court for the Northern District of Ohio held that section 6103 was the sole standard governing disclosure or nondisclosure of tax return information, FOIA notwithstanding.[17]

In limited circumstances, federal caselaw has extended the confidentiality provisions of section 6103 to restrict access to state as well as federal tax information.[18] The applicability of section 6103 to state tax information was examined by the District Court of Connecticut in *In re Cruz*.[19] In this case, the court ruled on a motion by the Connecticut Commissioner of Revenues during an arson investigation to quash a federal grand jury subpoena issued for state tax records, which were protected from disclosure under Connecticut statutes.[20] The court held that tax information protected by state statute[21] was entitled to the qualified privileges established by section 6103 under Rule 501 of the Federal Rules of Evidence.[22] The court quashed the subpoena without prejudice and granted the grand jury ten days to attempt to overcome the qualified privilege of section 6103 by submitting an affidavit meeting the requirements of section 6103(i)(1)(B) for release.[23]

Access to Tax Information During the Investigation of Nontax Crimes

The standards for disclosure to federal officers and employees for administration of federal laws not relating to tax administration are set forth at 26 U.S.C. § 6103(i). This section reads:

> (1) Disclosure to Federal Officers or Employees for Administration of Federal Laws not relating to Tax Administration.
>
> (A) In General. Except as provided in paragraph (6), any return or return information with respect to any specified taxable period or periods shall, pursuant to and upon the grant of an ex-parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who personally and directly engaged in

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[11] *See generally* Department of Justice Memoranda from D. Lowell Jensen, Assistant Attorney General, Criminal Division to All United States Attorneys and Strike Force Chiefs, subject: Obtaining Returns and Return Information From the Internal Revenue Service (Sept. 10, 1982) and subject: Forms to be used for obtaining returns and return information from the Internal Revenue Service (Oct. 12, 1982).

[12] *See* Heinsohn v. IRS, 553 F. Supp. 791 (E.D. Tenn. 1982). *See also* Watson v. IRS, 538 F. Supp. 817 (S.D. Texas 1982).

[13] 481 F. Supp. 486 (D.D.C. 1979).

[14] 5 U.S.C. § 552a (1982).

[15] 481 F. Supp. at 490.

[16] 528 F. Supp. 119 (N.D. Ohio 1981).

[17] *Id.* at 121.

[18] *See In re* Hamper, 651 F.2d 19 (1st Cir. 1981); *In re* Cruz, 561 F. Supp. 1042 (D. Conn. 1983); *In re* Grand Jury Empanelled January 21, 1981, 535 F. Supp. 537 (D.N.J. 1982).

[19] 561 F. Supp. 1042 (D. Conn. 1983).

[20] *Id.* at 1043.

[21] Many states have confidentiality provisions in their state revenue statutes that are similar in either design or effect to section 6103. *See generally Raiding the Confessional, supra* note 1. Although slightly dated, this comment provides an excellent overview of the various confidentiality provisions found in state tax statutes and provides a complete listing of the state statutes in effect at the time of publication. Additionally, it provides a useful summary of the federal confidentiality provisions relative to tax information in effect prior to the 1982 revision of section 6103.

[22] 561 F. Supp. at 1045–46. *See generally* 2 Weinstein's Evidence § 501–1 (1985); 2 Louisell & Mueller, Federal Evidence 387 (1978); McDaniel, *Situations in which Federal Courts are Governed by State Law of Privilege Under Rule 501 of the Federal Rules of Evidence*, 48 A.L.R. Fed. 259 (1980).

[23] 561 F. Supp. at 1046.

(i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,

(ii) any investigation which may result in such a proceeding,

(iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party, solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

(B) Application for order. The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States Attorney, any special prosecutor appointed under Section 593 of Title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to Section 510 of Title 28, United States Code, may authorize an application to a Federal district court judge or magistrate for the order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that—

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed.

(ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and

(iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

(2) Disclosure of return information other than taxpayer return information for use in criminal investigations.

(A) In general. Except as provided in paragraph (6), upon receipt by the Secretary of a request which meets the requirements of subparagraph (B) from the head of any Federal agency or the Inspector General thereof, or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States attorney, any special prosecutor appointed under Section 593 of Title 28, United States Code, the Secretary shall disclose return information (other than taxpayer return information) to officers and employees of such agency who are personally and directly engaged in

(i) preparation for any judicial or administrative proceedings described in paragraph (1)(A)(i),

(ii) any investigation which may result in such a proceeding, or

(iii) any grand jury proceeding described in paragraph (1)(A)(iii), solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

These provisions set forth two methods by which officials investigating nontax crimes can obtain access to information from IRS tax records. These methods vary according to the source of the information sought.[24]

Access to tax returns, all accompanying forms and schedules, including employer W–2 forms, and any other information provided either by the taxpayer, himself, or one of his representatives, can be obtained only with an order from a federal district court.[25] The government is required to show that:

there is a reasonable cause to believe that a federal crime has been committed,

there is a reasonable cause to believe that the above described returns and return information are or may be relevant to a matter relating to the commission of this crime,

the returns and return information are sought exclusively for use in a federal criminal investigation or proceeding concerning such crime, and

the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

Access to other than taxpayer return information may be obtained by heads of agencies who submit a written request to the Secretary of the Treasury.

These exceptions, which allow the release of tax returns and other than taxpayer return information, are commonly referred to by practitioners as i(1) and i(2) exceptions. As noted above, i(2) is a more limited category of information and will not be sought as frequently by other federal agencies as will i(1) information. Further, under current procedures, any i(2) information will be released automatically to the government in the event that it obtains court ordered access to i(1) information.

The procedural requirements to obtain court ordered access to i(1) information are not particularly difficult. The government can move for release of these records at an *ex parte* proceeding before a federal magistrate. The standard of proof is reasonable cause. As noted in the listing of the essential elements of proof set forth above, the government need not show actual relevancy. All that is required is a reasonable expectation that the information *may be* relevant to a federal crime under investigation. The outcome of the investigation need not be a criminal prosecution, but merely a "proceeding concerning" a federal crime, thus opening the door for the use of any information obtained in a civil or administrative proceeding based upon criminal activity. In contrast to the standards for access to tax records from

[24] *See generally* Department of Justice Memoranda, *supra* note 11.

[25] 26 U.S.C. § 6103(i)(1) (1982).

private parties through the use of an administrative subpoena, this procedure does require reasonable cause to believe that a specific federal crime has been committed.[26]

The present standards for release of tax information were established by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[27] Prior to 1982, the standards for release of taxpayer return information to federal law enforcement officials investigating nontax crimes was considerably higher. The elements for disclosure then were:

> reasonable cause to believe a crime has been committed;
>
> reason to believe that the return or return information *is probative evidence* of a matter in issue related to the commission of the crime; and
>
> information sought cannot be reasonably obtained from any other source, unless it is determined that, notwithstanding the reasonable availability of the information from another source, the return or return information sought constitutes the *most probative evidence* of the matter.[28]

Additionally, prior to TEFRA, the Code allowed a more decentralized procedure for authorizing requests for court ordered access to tax information. At that time, any agency head could request a court order for access.[29] Authority to authorize *ex parte* motions for access to tax records extended to acting officials, as well. In *United States v. Bledsoe,* defendants were convicted of a variety of offenses arising out of the fraudulent sale of agricultural commodities. None of the offenses involved tax administration. In preparing and presenting its case against Phillips, one of the defendants, the government prosecutors used information obtained from IRS files on Phillips. To obtain this information, government prosecutors obtained authorization from John C. Keeney, a Deputy Assistant Attorney General, to file an application before a federal district court judge for access to the IRS records on Phillips. On appeal, Phillips objected to the use and admission of this information, claiming that as the Deputy Assistant Attorney General, Mr. Keeney was not empowered to authorize the *ex parte* application in federal district court for access to tax records.[30] This case was tried prior to the 1982 revision of section 6103. The applicable language in effect at the time in section 6103i(1)(b)[31] read:

> The head of any Federal agency described in subparagraph (A) or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General or an Assistant Attorney General, may authorize an application to a Federal district court judge for the order referred to in subparagraph (A).

The Eighth Circuit acknowledged that the intent of section 6103 was to sharply restrict discretionary access to individual income tax returns and return information.[32] The court noted, however, that Mr. Keeney had been appointed an Acting Assistant Attorney General pursuant to 28 CFR § 0.132(e). Based upon this appointment, the court found that the procedures set forth in 6103 had been followed and denied Phillip's motion.[33] After TEFRA, the Department of Justice became the only executive department authorized to request court ordered access to tax records from the IRS.[34]

Alternative Methods of Accessing Tax Information

The effectiveness of the procedural safeguards restricting the access of law enforcement officials charged with investigating nontax crimes to tax information must be evaluated in light of the alternative investigative techniques for obtaining the same or similar information. These alternate techniques are:

> formal request to taxpayer;
> judicial search warrant;
> grand jury subpoena;
> administrative subpoena; and
> court ordered access pursuant to other federal statutes.[35]

Formal Request to the Taxpayer

The functional equivalent of a consent search, this is the simplest and easiest method of accessing tax information. This method is frequently overlooked because one would assume that taxpayers involved in a criminal investigation would never give their consent. There are, however, several reasons for taxpayers to voluntarily provide their records under these circumstances. The most obvious is that those suspects who are innocent have nothing to hide and have a vested interest in having the focus of the investigation shifted away from them. Even those suspects who have actually committed an offense may grant access either out of arrogance or general lack of mental acumen. This technique can

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[26] *Compare* the elements for disclosure under section 6103(i)(1) *with* the following four criteria for enforcement of administrative subpoenas established by the Supreme Court in United States v. Powell, 379 U.S. 48, 58 (1965):
a. an investigation with a legitimate purpose;
b. an inquiry which is relevant to that purpose;
c. the information sought must not already be in the possession of the agency issuing the subpoena; and
d. the subpoena must be issued in accordance with required administrative steps.

[27] Pub. L. No. 97–248, 96 Stat. 324 (1982) (codified at 26 U.S.C. §§ 7430–7431 (1982)).

[28] *See* United States v. Mangan, 575 F.2d 32, 38 (2d Cir. 1978) (emphasis added).

[29] *See* United States v. Bledsoe, 674 F.2d 647, 669 (8th Cir. 1982).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] 26 U.S.C. § 6103(i)(1)(B) (1982).

[35] *See generally* Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods,* 29 Am. Crim. L. Rev. 651 (1977); Internal Revenue Manual 9781–47, Handbook for Special Agents (Aug. 3, 1983).

be particularly advantageous when trying to narrow the range of suspects from a relatively large group. Merely knowing who chose not to consent may in itself be of significant investigative value. Another significant advantage of this technique for the government is that it does not require a prior showing of proof concerning the commission of a crime.

Judicial Search Warrant

Like any other piece of physical evidence, tax records can be obtained through the use of a judicial search warrant.[36] These warrants can be served on either the suspect or on any third party, such as a financial institution, accountant, or tax preparer, who might have copies of the records sought. The obvious limiting factor to the use of a judicial search warrant is the probable cause requirement.

Administrative Subpoena

Tax information can be obtained from sources outside the federal government by administrative subpoena.[37] Most administrative agencies are now empowered with some form of administrative subpoena power. Some administrative agencies, such as the Securities and Exchange Commission and the Federal Trade Commission, have specific subpoena authority to enable them to execute their statutory responsibilities.[38] Additionally, most federal agencies now have inspectors general who have administrative subpoena authority under section 6–4(a) of the Inspector General Act of 1978.[39] These inspectors general may use this subpoena authority to investigate any matter, either civil or criminal, relevant to matters within the responsibilities of their respective agencies.[40] These administrative subpoenas have long been viewed by the courts as a broad investigative tool that allows federal agencies to conduct general inspections of the records of individuals and business entities to ensure that all relevant statutes and regulations are being complied with.[41]

The Supreme Court has held that the use of these subpoenas is not predicated upon a preexisting quantum of proof indicating that any particular violation has occurred.[42] "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."[43] In so holding, the Court upheld the use of an administrative subpoena in an alleged "fishing expedition" by the Federal Trade Commission, noting that government investigations are normally sufficient "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."[44] The Court noted that corporations in particular have limited rights with which to resist the lawful use of administrative subpoenas. The Court's rationale reaffirmed the concepts that corporations do not enjoy fifth amendment privileges against self-incrimination and that corporations may not use the fourth amendment to assert an unqualified right to conduct their affairs in secret.[45]

The scope of the administrative subpoena authority of agency inspectors general is defined in section 6(a)4 of the Inspector General Act as follows:[46]

> [Inspectors general may] subpoena the production of all information, documents, reports, answers, records, accounts, paper, and data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court; provided that procedures other than subpoenas shall be used to obtain documents and information from Federal agencies.

An agency that has subpoena authority may compel the production of information from any private organization, business entity, or nonfederal government agency, provided that the information requested may be relevant to a matter falling within that agency's area of responsibility.[47] Sworn testimony can be obtained from a corporate official or other "records holders" identifying and authenticating records produced under this subpoena.[48]

An interesting use of this subpoena is to force the production of a suspect's tax records from the suspect himself or from his tax consultant. This is an alternate method of obtaining tax records and may be available when the judicial procedure used to obtain tax returns from the IRS is not available. This use of the administrative subpoena has been specifically approved by the courts.[49]

In *United States v. Art Metal,* the District Court for New Jersey held that the inspector general for the General Services Administration (GSA) was empowered by section

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[36] Fed. R. Crim. P. 41. *See, e.g.,* Weinstein v. Mueller, 563 F. Supp. 923 (N.D. Cal. 1982).

[37] *See, e.g., United States v. Powell.*

[38] *See* 15 U.S.C. § 49 (1982) (granting subpoena authority to the Federal Trade Commission); 15 U.S.C. § 78u(b) (1982) (granting subpoena authority to the Securities and Exchange Commission).

[39] 5 U.S.C. appendix III, Inspector General Act of 1978, Pub. L. No. 95–452, *amended by* Pub. L. No. 97–252 (1982).

[40] United States v. Art Metal—USA Inc., 484 F. Supp. 884, 887 (D.N.J. 1980).

[41] United States v. Morton Salt, 338 U.S. 632, 652 (1950).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] 5 U.S.C. appendix III, Inspector General Act of 1978, section 6(a)4, *amended by* Pub. L. No. 97–252 (1982). *See generally* United States v. Westinghouse Electric Corp., 615 F. Supp. 1163 (W.D. Pa. 1985).

[47] *See* United States v. Powell, 379 U.S. 48 (1965).

[48] *See, e.g.,* 26 U.S.C. § 7602 (a)(2) (1982); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

[49] *See* United States v. Art Metal—USA Inc.

604(b) to obtain the tax returns and related documents of a government contractor pursuant to a fraud investigation.[50] The court specifically found that the public policy underlying the Code did not prohibit disclosure of tax returns to the inspector general.[51] The court further held that nothing in title 26 of the U.S. Code or its legislative history could be reasonably regarded as barring any federal agency from gaining documents in the possession of the United States when relevant to an administrative investigation or to civil discovery.[52]

The court observed that the inspector general had the responsibility and the power to conduct, supervise, and coordinate audits and investigations relating to GSA programs in order to promote efficiency and to prevent fraud and abuse. The court also observed that the powers of the inspector general were not as limited as the IRS, which loses its administrative subpoena authority after a formal criminal referral has been made to the Justice Department.[53]

The Supreme Court, in *United States v. Powell,*[54] set forth the following four basic criteria for enforcement of administrative subpoenas:

the subpoena must be issued in a furtherance of an investigation with a legitimate purpose;

the matters addressed in the subpoena must be relevant to that purpose;

the information sought must not already be in the possession of the agency issuing the subpoena; and

the subpoena must be issued in accordance with the required administrative steps.

In comparing these standards to those required for court-ordered access under section 6103, note that section 6103 only requires proof that the information sought *may* be relevant to an on-going investigation, whereas the standards for enforcement of administrative subpoenas established in *Powell* requires *proof* of actual relevancy.

Access During Joint Investigations

Limited access to tax information may also be obtained by government personnel investigating nontax crimes during joint investigations with the IRS.

Investigations of nontax crimes will often extend into the tax crime area. For example, a contractor who falsifies cost and pricing data in a bid or proposal may also be falsifying his yearly business expenses on his tax return. When significant amounts of tax revenue are lost as a result of such falsification, a joint investigation may be conducted by the Federal Bureau of Investigation and the IRS. These joint investigations increase the avenues for access by nontax crime investigators to tax records, because IRS investigators may proceed under section 6103 h(1), which allows disclosure of tax records to Treasury Officers and records employees for purposes of tax administration. This section provides:

(h) Disclosure to certain Federal Officers and employees for purposes of tax administration.

(1) Department of the Treasury—Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.

Treasury personnel have automatic access to tax information. The disclosure provision of section 6103(h) all require that the matters under investigation pertain to "tax administration." The term has been given a broad statutory definition which the courts have liberally construed.[55] "Tax administration" is defined by the Code as follows:

(4) Tax administration. The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and,

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.[56]

Within certain restrictions, tax information obtained which suggests a violation of federal criminal law may be released by the IRS to other federal investigators even if the suspected violation does not involve tax administration. Normally, the tax information which may be released is limited to the taxpayer's identity and other than taxpayer return information. If, however, the tax information indicates the imminent danger of death or physical injury, the IRS may disclose return information as well.[57]

Currency Transaction Reports

Under the Currency and Foreign Transactions Reporting Act,[58] whenever someone uses a bank, savings and loan, credit union, or any other specified financial institution located within the continental United States to engage in a cash transaction involving more than $10,000, the institution must report the transaction within fifteen days to the

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[50] 484 F. Supp. at 888.

[51] *Id.* at 887.

[52] *Id.*

[53] *Id.* at 886. *See generally* United States v. LaSalle National Bank, 437 U.S. 298 (1978).

[54] 379 U.S. 48, 58 (1965).

[55] *See* United States v. Mangan, 575 F.2d 32, 40 (2d Cir. 1978).

[56] 26 U.S.C. § 6103(b)(4) (1982).

[57] 26 U.S.C. § 6103(i)(3) (1982).

[58] 12 U.S.C. §§ 1051–1122 (1982). The enacting regulations are at 31 C.F.R. § 103.11–103.31 (1984).

Treasury Department.[59] Similarly, persons who send or receive U.S. currency in excess of $5,000 at one time across United States borders must also file a report with the Treasury Department.[60] Copies of these reports are available to any federal agency or department upon written request.[61]

Accessing Tax Preparers Records

As noted, the regulations under section 7216 of the Code specifically address the use of alternative investigative techniques to obtain tax information from tax preparers. Federal Income Tax Regulation § 301.7216–2 specifically requires tax preparers to release tax information pursuant to court orders and agency subpoenas. These regulatory provisions read as follows:

> Reg § 301.7216–2(c) Disclosure pursuant to an order of Court or of a Federal or state agency.
>
> The provisions of Section 7216(a) and § 301.7216–1 do not apply to any disclosure of tax return information if such disclosure is made pursuant to any one of the following documents:
>
> (1) The order of any Court of record, Federal, State, or local or
>
> (2) A subpoena issued by a grand jury, Federal or State, or
>
> (3) An administrative order, demand, summons, or subpoena which is issued in the performance of its duties by—
>
> (i) Any Federal agency, or
>
> (ii) A State agency, body or commission charged under the laws of the State or a political subdivision of the State with the licensing registration, or regulation of tax return preparers.

It is interesting that the IRS chose to discuss the preparers' obligation to respond to grand jury and administrative subpoenas in this particular paragraph. The statute clearly presents two categories of authorized disclosure by preparers: disclosure pursuant to a specific provision of the Code; and disclosure pursuant to court order.[62] The first category is addressed in Federal Income Tax Regulation § 301.7216–2(a), Disclosure pursuant to other provisions of the Internal Revenue Code; but that section does not include the IRS' discussion of grand jury subpoenas. Grand jury subpoenas are discussed only in section 307.7216–2(c). This placement has a double-edged significance. From the government's standpoint, structuring the regulations in this manner enhances the proposition that grand jury subpoenas are "court orders." This position strengthens the authority of the grand jury subpoena and has been strongly advocated by the government.[63] Defense attorneys, however, might exploit the fact that the statutory provision that addresses disclosure "pursuant to an order of a court" makes no reference at all to administrative summons or subpoenas. Further, administrative agencies are not quasi-judicial bodies as are grand juries.[64] Accordingly, there is no judicial nexus to support the theory that administrative orders standing alone would constitute "an order of a court" as contemplated by the statute. This creates the possibility of a defense motion to suppress evidence obtained from preparers by administrative orders, which are not enforced by court order. This argument would note that there is no specific statutory provision which authorizes release of tax information to an administrative summons or subpoena, and that these administrative orders on their face, are not court orders. Consequently, release pursuant to these orders falls in neither of the two statutory exceptions provided in section 7216.

Whenever the government chooses to utilize an investigative tool such as a search warrant or subpoena to compel the production of tax information from the taxpayer himself, a critical issue arises as to the extent of the taxpayer's obligation to produce the tax records requested. While no federal decisions on this point were discovered, at least one state appellate court has provided guidance in an analogous area. The Illinois Appellate Court in *Hawkins v. Wiggins*[65] held that a taxpayer's obligation to produce tax records in a civil suit between private parties extended to tax records which the taxpayer had the power to obtain as well as to those records actually within the taxpayer's custody. Ironically, the court ruled that a taxpayer's right under section 6103 to inspect and reproduce copies of his tax returns invalidated taxpayer's assertions that federal income tax records were not within his actual physical control as a defense to a notice by an opposing party in civil litigation to produce those records.[66]

Section 6103, Enforcement Provisions

The Code provides both civil and criminal penalties for violations of confidentiality procedures.[67] Criminal sanctions are imposed by section 7213, which makes the willful unauthorized disclosure of tax information a felony.[68] This section extends to federal and state employees and to any other persons who receive income tax information through the established disclosure procedures.[69] Punishment for violating this statute may include up to five years of

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[59] 31 C.F.R. §§ 103.22, 103.25 (1984).

[60] 31 C.F.R. § 103.23 (1984).

[61] 31 C.F.R. § 103.43 (1984).

[62] 26 U.S.C. § 7216(b)(1) (1982).

[63] *See, e.g., In re* Gren, 633 F.2d 825 (9th Cir. 1980); Matter of Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253 (D. Md. 1981); *In re* Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc. of Georgia, 498 F. Supp. 1174 (N.D. Ga. 1980).

[64] *See* United States v. Zarttini, 552 F.2d 753 (7th Cir. 1977).

[65] 92 Ill. App. 3d 278, 415 N.E.2d 1179 (1980).

[66] *Id.* The Supreme Court has refrained from addressing the fifth amendment issue. *See* United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976).

[67] 26 U.S.C. §§ 7213, 7431 (1982).

[68] 26 U.S.C. § 7213 (1982).

[69] 26 U.S.C. § 7213(a) (1982).

imprisonment, a $5,000 fine, or both, and costs of prosecution.[70] Federal employees convicted of this offense also face automatic dismissal.[71]

Solicitation by any person of the unauthorized release of tax information is also a felony offense, punishable by the same basic sanctions as the principal crime.[72]

The unauthorized disclosure of tax information by tax preparers is a misdemeanor offense punishable by up to one year in prison, a $1,000 fine, or both, plus the costs of prosecution.[73] Preparers are allowed to disclose tax information in accordance with the procedures set forth in the Code or pursuant to court order.[74] Note that this section expressly allows the use of federal tax information in the preparation of state and local tax returns.[75] Tax preparers are specifically required by the regulations under section 7216 to release tax information to federal and state grand juries pursuant to the issuance of a summons or subpoena.[76]

Other criminal sanctions that are potentially applicable to the unauthorized disclosure of tax information are found in 18 U.S.C. § 1905 (1982), Disclosure of Confidential Information. Under this section federal personnel who make unauthorized disclosures of confidential information that they receive in the course of their official duties may be convicted of a misdemeanor offense punishable by up to a $1,000 fine, up to one year in prison, or both, and removal from office or employment.

Civil sanctions for the unauthorized disclosure of returns and return information are also authorized.[77] This provision establishes a private cause of action which may be brought by any taxpayer whose return or return information[78] is knowingly or negligently disclosed in violation of section 6103 by any officer or employee of the United States. The government will not be held liable under this section for good faith disclosures made pursuant to an erroneous interpretation of section 6103.[79]

Where government liability is established, the plaintiff will be entitled to damages of no less than $1,000 for each act of unauthorized disclosure.[80] The statute provides for the recovery of any actual damages sustained by plaintiff as a result of unauthorized disclosures,[81] plus the recovery of punitive damages where the disclosure is found to be from willful or grossly negligent government misconduct.[82] Successful plaintiffs are also specifically authorized to recover the costs of bringing actions under this section.[83] The statute of limitations for these actions extends two years from the date the unauthorized disclosure is discovered by the taxpayer.[84]

The authorization of punitive damages provides a formidable deterrent to willful or grossly negligent disclosures in violation of section 6103 by creating a tremendous financial incentive for taxpayers to litigate actions under this section.[85]

It is important to note that, in addition to the civil remedies provided by the Code,[86] certain unauthorized disclosures of tax information may coincide with collateral

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[70] 26 U.S.C. § 7213(a)(1)(b) and (3) (1982).

[71] 26 U.S.C. § 7213(a)(1) (1982).

[72] 26 U.S.C. § 7213(a)(4) (1982).

[73] 26 U.S.C. § 7216(a) (1982).

[74] 26 C.F.R. § 301.7216(b)(1) (1984).

[75] 26 U.S.C. § 7213(b)(2) (1982).

[76] 26 C.F.R. § 301.7216-2(c) (1984).

[77] 26 U.S.C. § 7431 (1982).

[78] 26 U.S.C. § 7431(e) (1982) specifies that "returns" and "return informations" for this provision are as defined in § 6103(b).

[79] 26 U.S.C. § 7431(b) (1982).

[80] 26 U.S.C. § 7431(c)(1)(A) (1982).

[81] 26 U.S.C. § 7431(c)(1)(B)(i) (1982).

[82] 26 U.S.C. § 7431(c)(1)(B)(ii) (1982).

[83] 26 U.S.C. § 7431(c)(2) (1982).

[84] 25 U.S.C. § 7431(d) (1982).

[85] *See generally* Doralee Estates, Inc. v. Cities Service Oil Co., 569 F.2d 716, 723 (2d Cir. 1977) (to function, the award of punitive damages must be of sufficient substance to smart the offender).

[86] Prior to TEFRA, a specific civil remedy was provided by section 7217, *added by* Pub. L. No. 94-455, Title XII § 1202(e)(1), 90 Stat. 1687 (1976), *amended by* Pub. L. No. 95-600, Title VII, § 701(b)(7) (1978) (repealed 1982), which read as follows:

(1) Code Sec. 7217. CIVIL DAMAGES FOR UNAUTHORIZED DISCLOSURE OF RETURNS AND RETURN INFORMATION

(a) General Rule. Whenever any person knowingly, or by reason of negligence, discloses a return or return information (as defined in section 6103(b)) with respect to a taxpayer in violation of the provisions of section 6103, such taxpayer may bring a civil action for damages against such person, and the district courts of the United States shall have jurisdiction of any action commenced under the provisions of this section.

(b) No Liability for Good Faith but Erroneous Interpretation. No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) Damages. In any suit brought under the provisions of subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) actual damages sustained by the plaintiff as a result of the return or return information and, in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, but in no case shall a plaintiff entitled to recovery receive less than the sum of $1,000 with respect to each instance of such unauthorized disclosure; and

(2) the costs of the action.

(3) Period for Bringing Action. An action to enforce any liability created under this section may be brought without regard to the amount in controversy, within 2 years from the date on which the cause of action arises or at anytime within 2 years after discovery by the plaintiff of the unauthorized disclosure.

violations of the Right to Financial Privacy Act, thus triggering civil sanctions under that statute as well.[87] This act prohibits the indiscriminate access of federal personnel to personal financial information maintained by financial institutions. This statute took effect in 1979 and established an elaborate system which mandated the specific mechanisms and procedural requirements applicable to the federal government's access to and use of personal financial information.[88] Consideration of this statute is appropriate because there are certain areas where the definitions of "tax information" as used in the confidentiality provisions of the Code and "financial information" as used in the Right to Financial Privacy Act overlap. Take, for example, the IRS 1099 Form concerning interest payments which financial institutions are required to issue pursuant to the 1982 TEFRA amendments.[89] Because these forms are prepared for and on behalf of an individual taxpayer, they are considered taxpayer return information within the meaning of the Internal Revenue Code confidentiality provisions.[90] These forms also constitute personal financial information within the meaning of the Right to Financial Privacy Act because they contain information maintained by a financial institution concerning the financial history or status of a protected person.[91] It is quite possible that an overzealous or poorly managed investigation may involve collateral violations of both these statutes in the government's attempts to obtain similar financial information from alternate sources.

Effects of Violations on Legal Proceedings

Courts have been reluctant to extend the specific sanctions provided by the Code to enforce the confidentiality provisions of section 6103. In *United States v. Mangan,*[92] the Second Circuit addressed the availability of the exclusionary rule as an enforcement mechanism. In this case, the court held that the unauthorized disclosure of a tax return to a U.S. Attorney in violation of the formal requirement of section 6103 did not foreclose its use in a judicial proceeding, such use being otherwise permissible under the provisions of section 6103 governing disclosure in judicial and administrative tax proceedings.[93] In interpreting section 6103, the court found that Congress did not desire the courts to apply the exclusionary rule to every violation of the Code's confidentiality provisions.[94]

Federal courts have also refused to quash administrative summons and grand jury subpoenas because of section 6103 violations. In *In re Grand Jury Investigation,*[95] the Sixth Circuit held that section 6103 violations did not justify the refusal of a witness to comply with a grand jury subpoena.[96]

The court refused to apply a "fruit of the poisonous tree" type of analysis and held that the tax information obtained in violation of section 6103 must be submitted to the grand jury for its consideration,[97] finding that the confidentiality provisions of section 6103 did not restrict the use of such evidence before the grand jury.[98]

The relationship between compliance with section 6103 and the enforceability of the IRS administrative summons[99] was squarely addressed by the Tenth Circuit in *United States v. Scholbe.*[100] In this case, the IRS issued a summons in a taxpayer civil liability case. It shared the information received with another federal criminal investigative agency, the Drug Enforcement Administration; but only to the extent permitted by section 6103. The court refused to quash the administrative summons in this case.[101]

In *United States v. Crans,*[102] a district court in New York recognized a form of the "silver platter doctrine" in this area by refusing to quash administrative summons issued in part because of an unauthorized disclosure of tax information by nongovernment personnel. The court held that where the disclosure of information did not come from an IRS officer, the fact that there may have been some disclosure which lead to the issuance of a summons did not require that the summons be quashed.[103]

Courts have also refused to reverse convictions based on evidence obtained in violation of section 6103. In *United States v. Bacheler,*[104] the Third Circuit held that the improper disclosure of tax information did not mandate a reversal of a conviction for filing a false tax return where there had been a referral from the Secretary of the Treasury

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[87] 12 U.S.C. § 3417 (1982). For a discussion of this act and its implications, *see* Hutton, *The Right to Financial Privacy: Tool to Investigate Fraud and Discover Fruits of Wrongdoing,* The Army Lawyer, Nov. 1983, at 10.

[88] *See* 12 U.S.C. §§ 3401(3), 3402 (1982).

[89] *See, e.g.,* 26 C.F.R. § 1.6049–4 (1984).

[90] 26 U.S.C. § 6103(b)(3) (1982).

[91] 12 U.S.C. § 3401(2) (1982). "Financial record" means an original of, a copy of, or information known to have been dictated from, any record held by a financial institution pertaining to a customer's relationship with the financial institution.

[92] 575 F.2d 32 (2d Cir.), *cert. denied,* 439 U.S. 931 (1978).

[93] *Id.* at 41.

[94] *Id.*

[95] 696 F.2d 449 (6th Cir. 1982).

[96] *Id.* at 451.

[97] *Id.* at 450.

[98] *Id.*

[99] 26 U.S.C. § 7602 (1982).

[100] 664 F.2d 1163 (10th Cir. 1981).

[101] *Id.* at 1168.

[102] 517 F. Supp. 863 (N.D.N.Y. 1981).

[103] *Id.*

[104] 611 F.2d 443 (3d Cir. 1979).

to the Department of Justice in a matter of tax administration.[105]

There is limited precedent on "taxpayers" procedural rights in asserting a possible section 6103 violation. At least one federal circuit has not felt compelled to guarantee a hearing to any defendant who merely alleges a section 6103 violation. The Second Circuit, in *US v. Boylan,*[106] denied defendant a hearing on a claim that the prosecution had obtained tax information in violation of the good faith requirements of section 6103. In this case, the defendant's affidavit urged the court to hold that his tax records were improperly disclosed as a result of unauthorized interagency cooperation.[107] The government submitted a detailed affidavit listing the proper authorizations to obtain the defendant's tax returns.[108] In light of the government's affidavits, the court found the defendant's submission to be conclusionary and denied the defense motion for hearing.[109] Defendant's motion for grant of certoriari to the United States Supreme Court was denied.[110]

The possibility of a section 6103 violation was not adequate justification for a taxpayer's request for injunctive relief in *Trahan v. Regan.*[111] In this case, the District Court for the District of Columbia denied the taxpayer's request for injunctive relief to prohibit the release of tax information to the Social Security Administration.[112] The court rejected the notion that the possibility of an unauthorized release of tax information was an appropriate matter for injunctive relief, citing as a partial rationale the adequacy of the civil penalty provision.[113]

Comparative Protections of Financial Information

The protections afforded tax information may be evaluated in light of other statutes restricting access to personal financial information. Examples of these follow.

Right to Financial Privacy Act

The Right to Financial Privacy Act restricts the government's access to personal financial records maintained by financial institutions.[114] "Person" under the act is defined as an individual or a partnership of five or fewer individuals.[115] "Financial institution" includes banks, savings and loans, credit unions, and other consumer finance institutions located within the continental United States or within U.S. territories or possessions.[116] The act establishes five basic avenues by which the government can obtain release of financial records. These are pursuant to customer authorization, administrative subpoenas, search warrant, judicial subpoena, and formal written request to the financial institution.[117] Normally, the government is required to notify the person that his records are being sought and to inform him of the purpose of the inquiry, prior to gaining access to the records.[118] The government can gain access to financial institution records covertly, *i.e.,* without notice to the target, only upon a successful showing to the appropriate judge or magistrate

that the investigation being conducted is lawful;

that the records being sought may be relevant to the investigation; and

that there is reason to believe that notice to the person will compromise the investigation.

When access to financial records is sought by administrative or judicial subpoena or by written request to the financial institution,[119] the government is obligated by the Act not only to notify the target of its inquiry, but also to draft a motion to quash access to the records sought and to send a copy of this motion to the targeted person with instructions for filing.[120]

Civil sanctions for violations of the Right to Financial Privacy Act are established by section 3417. The primary sanction is a civil cause of action on behalf of the target individual against both the government and the financial institution which released the information. The statutory damages provided in this cause of action are:

(1) $100 without regard to the volume of records involved;

(2) any actual damages sustained by the customer as a result of the disclosure;

(3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and

(4) in the case of any successful action to enforce liability under this section, the cost of the action together

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[105] *Id.* at 449.

[106] 620 F.2d 359 (2d Cir.), *cert. denied,* 449 U.S. 833 (1980.

[107] *Id.* at 362.

[108] *Id.*

[109] *Id.*

[110] 449 U.S. 833 (1980).

[111] 554 F. Supp. 57 (D.D.C. 1982).

[112] *Id.* at 63.

[113] *Id.* at 61. The court also based its decision on the absence of an irreparable injury, as no disclosure had as yet taken place and as the plaintiffs/taxpayers retained the right to revoke their consent to disclosure.

[114] 12 U.S.C. §§ 3401–3422 (1982).

[115] 12 U.S.C. § 3401(4) (1982).

[116] 12 U.S.C. § 3401(1) (1982).

[117] 12 U.S.C. § 3402 (1982).

[118] 12 U.S.C. §§ 3404–3408 (1982).

[119] 12 U.S.C. § 3409 (1982).

[120] *See* 12 U.S.C. §§ 3405, 3407, and 3408 (1982). The government need not prepare a motion when access is sought by way of a search warrant. *See* 12 U.S.C. § 3406 (1982).

with reasonable attorney's fee as determined by the court.[121]

Additionally, federal employees face automatic review for disciplinary action in the event that any violation is found to be willful or intentional.[122] Of particular concern to the government is the specific statutory authorization of punitive damages.[123] It is hard to imagine what sum of money a court would impose as punitive damages against the United States or a major financial institution found in violation of this statute. That amount, however, would certainly create a strong financial incentive to vigorously prosecute a civil claim for damages.

The Right to Financial Privacy Act has an interesting provision which specifically extends its sanctions to financial information subject to the Act which is obtained through the use of grand jury subpoenas. Section 3420 of the Act requires that all financial records obtained from a financial institution pursuant to a grand jury subpoena must actually be presented to a grand jury.[124] This provision is designed to prevent abusive of the grand jury subpoena by the government to support a noncriminal investigation.[125] Section 3420 also limits the use of such records to grand jury deliberations on indictment or presentment; the criminal prosecution of the offense for which the indictment or presentment was issued; and to purposes authorized by Rule 6(e) of the Federal Rules of Criminal Procedure.[126]

This seemingly unnecessary repetition of the protections accorded all grand jury material becomes clear when read in light of section 3417, *Civil Penalties,* which, as noted above, establishes the entitlement to punitive damages for willful or intentional violations of the Act.[127] The net effect of including this provision is to extend the sanctions for the abusive use of the grand jury subpoena when the information concerned is financial information within the meaning of the Right to Financial Privacy Act. As noted above, this category partially overlaps the definitions of tax return information.[128] Consequently, the extension of the penalties for abuse of the grand jury subpoena provided by the Right to Privacy Act must be considered in evaluating the sanctions for the unauthorized access to tax information.

Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury Secrecy

Financial information obtained from any source by use of the grand jury process is accorded some form of protection by Rule 6(e) of the Federal Rules of Criminal Procedure, which governs grand jury secrecy.

The confidentiality of grand jury proceedings is one of the most fundamental concepts of American criminal jurisprudence.[129] The courts have long recognized that secrecy is an essential element of the grand jury concept which was incorporated into the United States Constitution as a carryover from the traditions of English common law.[130]

Release of information obtained by a grand jury requires a court order from the supervising federal district court judge.[131] Such an order can be obtained if the government can show in an *ex parte* motion either that the information sought falls outside the scope of Rule 6(e), or that a judicial proceeding is either pending or in progress and the government has a particularized need for disclosure that outweighs any continuing interest in secrecy.[132]

Rule 6(e) applies to "all matters occurring before the grand jury."[133] This definition normally extends to evidence presented before the grand jury and any information indicating the direction of the grand jury proceedings. As a general rule, federal courts have held that documents which have an independent existence from the grand jury proceedings, *e.g.,* corporate records, are not "matters occurring before the grand jury" and therefore do not fall within Rule 6(e).[134] This does not mean, however, that one can bypass the necessity of obtaining a court order to secure the release of these documents. This requirement extends to any information obtained through the grand jury process.[135]

The government can obtain the release of evidence presented before a grand jury, often referred to as 6(e) information, by establishing in an *ex parte* motion that failure to disclose this information would result in an injustice at a pending or current judicial proceeding. The existence of a judicial proceeding must be more than mere speculation. Consequently, it would not be possible to obtain grand jury information during the preliminary investigative phases of a case. Accessing this information, however, can be extremely

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[121] 12 U.S.C. § 3417(a) (1982).

[122] 12 U.S.C. § 3417(b) (1982).

[123] 12 U.S.C. § 3417(a)(3) (1982). *See generally Punitive Damages,* 56 S.Cal. L.Rev. 1 (1983).

[124] 12 U.S.C. § 3420(1) (1982).

[125] *See* United States v. Sell Engineering Inc., 463 U.S. 417 (1983).

[126] 12 U.S.C. § 3420(2) (1982).

[127] *See Supra* note 121 and accompanying text.

[128] *See Supra* notes 86–91 and accompanying text.

[129] *See* United States v. Mandujano, 425 U.S. 564, 571 (1976). The rule of confidentiality imposed by Rule 6(e) is not absolute. For example, witnesses who are called before the grand jury are not bound to secrecy. *See* United States v. Sells Engineering Inc; Fed. R. Crim. P. 6(e)(2). A complete discussion of grand jury secrecy is beyond the scope of this presentation. For a detailed treatment of this topic, see 1 C. Wright, Federal Practice and Procedure, Criminal 2d §§ 106–109.1 (1982).

[130] *See* Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979).

[131] Fed. R. Crim. P. 6(e)(3)(c)(i).

[132] *See, e.g., In re* Petitions for Disclosure of Documents, 617 F. Supp. 630 (S.D. Fla. 1985). *Compare In re* Grand Jury Matter, 658 F.2d 61 (3d Cir. 1982) *with Douglas Oil Co. v. Petrol Stops Northwest.*

[133] Fed. R. Crim. P. 6(e)(2).

[134] *See, e.g., In re* Special February 1975 Grand Jury, 662 F.2d 1232 (7th Cir. 1981), *aff'd sub. nom.* United States v. Baggot, 463 U.S. 476 (1983).

[135] *See United States v. Sells Engineering, Inc; United States v. Baggot.*

valuable to supplement or further develop the government's case once litigation has been initiated.

A sliding scale type of analysis is used to balance the importance of disclosure against the continued need for secrecy. The commonly noted reasons for grand jury secrecy are:

1. to ensure the freedom of grand jury deliberations;
2. to ensure and encourage free disclosures of information to the grand jury;
3. to prevent the intimidation of grand jury members and witnesses;
4. to prevent the flight from prosecution of grand jury targets; and
5. to protect the reputations of innocent persons investigated, but later cleared by the grand jury.[136]

Three additional policy considerations were mentioned by the Supreme Court in *United States v. Sells Engineering, Inc.*:

1. to allow the government through its criminal attorneys to effectively assist the grand jury in its deliberations and to prosecute cases more effectively by knowing what transpires before the grand jury;
2. to protect the grand jury process from prosecutorial abuse; and
3. to ensure that government attorneys adhere to established procedures designed to limit their powers of discovery and investigation.

Policy considerations supporting secrecy may understandably diminish in importance in those cases where federal prosecution has either been completed or declined.[137] Government personnel ignore these restrictions at their risk. Violations of Rule 6(e) are classified as misdemeanors under the Federal Rules of Criminal Procedure. In certain cases, however, some federal circuits have held Rule 6(e) violations to be obstructions of justice, thereby making them felony offenses.[138]

Credit Reports

Credit reports can contain a tremendous amount of information concerning a person's current financial status and past, as well as prospective, commercial transactions. The confidentiality of these reports pertaining to individuals is protected by the Fair Credit Reporting Act.[139] Corporations and other business entities are not afforded any protection as "consumers" under this act.[140] The general rule of confidentiality established by this act requires the government to obtain a court order prior to gaining access to these reports.[141] An important exception to this general rule is provided under section 1681(f), which specifically authorizes the release of information to government agencies of a consumer's name, address, former address, place of employment, and former places of employment.[142]

In contrast to section 6103 and Rule 6(e), the Fair Credit Reporting Act does not require a showing of proof by the government prior to the court authorizing access. Further, there are no mandatory notification procedures to the person whose records are being sought as required by the Right to Financial Privacy Act.[143]

The statute is silent as to the type of court which is authorized to order access to credit reports. It is reasonable to assume, however, that any federal court of general jurisdiction located in the same district as the records sought would be authorized to issue an access order. There also appears to be no prohibition to the government requesting an access order by way of an *ex parte* motion. Like section 6103, the Fair Credit Reporting Act includes both criminal and civil enforcement provisions.[144]

Analysis and Conclusion

Several conclusions and observations may be drawn from the above analysis of section 6103. First, it is clear that section 6103 provides government investigators of nontax crimes with one of the more advantageous methods of access to tax information. By utilizing section 6103 to obtain tax records from the IRS, investigators may avoid notifying the taxpayer of the investigation. In this regard, section 6103 affords the government more flexibility in maintaining the covert nature of an investigation than do alternate techniques, such as attempts to obtain this information from the taxpayer himself or from third parties.

Even if the government obtains a waiver of the normal notification procedures required by the Right to Financial Privacy Act,[145] there is always a greater possibility that a taxpayer will learn of an inquiry to a financial institution that he does business with than exists when access is requested in accordance with section 6103. The standards for access under section 6103 are certainly less onerous than those required by Rule 6(e) relating to access to grand jury information. Unlike Rule 6(e), section 6103 does not require that government's request for access be "preliminarily to or in connection with" a judicial proceeding.[146]

Note also that section 6103 information may be used in "any proceeding relating to a violation of Federal criminal law," and is not strictly limited to use in criminal prosecutions. In this regard, section 6103 information is more versatile than information obtained by a grand jury subpoena. As stated above, information obtained by the grand jury

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[136] *Sells Engineering; Baggot.*

[137] *See* Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 223 (1979).

[138] *See, e.g.*, United States v. Howard, 569 F.2d 1331 (5th Cir. 1978). *See generally* Annot., 73 A.L.R. Fed. 112 (1985).

[139] 15 U.S.C. §§ 1681–1681t (1982).

[140] 15 U.S.C. § 1681(a)(c) (1982).

[141] *See* 15 U.S.C. § 1681(b)(1) (1982); *In re* Grand Jury Proceedings, 503 F. Supp. 9 (D.N.J. 1980); *In re* Vaughn, 496 F. Supp. 1080 (N.D. Ga. 1980).

[142] 15 U.S.C. § 1681(f)(1982).

[143] See *supra* notes 114–120 and accompanying text.

[144] *See* 15 U.S.C. §§ 1681n, 1681o, 1681q (1982).

[145] *See supra* note 117 and accompanying text.

[146] *See United States v. Sells Engineering Inc.; see also United States v. Baggot.*

can be used in only criminal proceedings unless release is authorized under Rule 6(e).[147] Another comparative advantage for the government to accessing tax information under section 6103 is that only potential relevancy is required. The government is not held to the "particularized need" standard required under Rule 6(e), nor is it required to show actual relevancy as necessary to enforce an administrative subpoena.

It is also clear that the standards of confidentiality provided by section 6103 have been significantly compromised by recent statutory developments such as the 1982 revision to section 6103 which significantly relaxed the standards for release.[148] The Inspector General Act of 1978,[149] vesting general administrative subpoena authority in most executive agencies, must also be noted as it has provided federal investigators a powerful tool for obtaining tax information from nongovernmental sources.

From a policy consideration, it is interesting that unlike other laws dealing with confidentiality and privilege, section 6103 does not differentiate between individual taxpayers and "nonindividual" taxpayers, *i.e.,* corporations, partnerships, and other business entities. There appears to be a clear trend in American law to accord more respect to an individual's right to privacy than that which is normally given to a corporation or other business entity. For example, American jurisprudence does not recognize a corporate privilege under the fifth amendment.[150] As noted above, individuals not corporations, are protected under the Fair Credit Reporting Act.[151] Likewise, under the Right to Financial Privacy Act, the class of protected "persons" is limited to individuals or partnerships of five or fewer individuals.[152]

The Bank Secrecy Act, noted above[153] certainly represents a major statutory compromise of the confidentiality of commercial financial information. It is hard to imagine a major financial transaction that would not fall within the provisions of this act, thus requiring a report to the government that is easily accessible to all federal investigators.

Another indicator of the reluctance of contemporary American jurisprudence to extend the confidentiality of corporate financial information is the recent Supreme Court case of *United States v. Arthur Young & Company,*[154] in which the Court, despite strong arguments from the private sector, unanimously reaffirmed its express rejection of the notion of an accountant-client privilege.

If the general trend towards decreasing the degree of confidentiality accorded to tax information continues, it is probable that a future revision of section 6103 might incorporate a distinction between individual and nonindividual taxpayers that would reduce the protection presently accorded to the tax returns of corporations and other business entities.

In evaluating the policy considerations, the Supreme Court's reaffirmance of its refusal to recognize the accountant-client privilege in *Arthur Young* would undoubtedly be cited by those supporting a less restrictive revision of section 6103. The conflicting rights and policy considerations that the Court balanced are arguably very similar to those which Congress balanced in its successive enactments of section 6103.[155] The Court weighed the need of the IRS for corporate financial information in order to effectively administer the tax system against defendant's claim for confidentiality in corporate discussions with accountants and auditors to ensure complete and accurate financial disclosure. The Court found the need to effectively administer the tax system to be the more compelling public policy. The Court dismissed defendant's alleged need for confidentiality during financial disclosures to accountants and auditors, noting that companies which have publicly traded securities are obligated under federal law to provide accurate and complete financial information.[156] One might argue that *Arthur Young* represents the Court's endorsement of the strong public policy considerations in ensuring the effective administration of the tax system, and that as this is the one of the major policy considerations supporting the confidentiality of tax information under section 6103, the Court has in fact endorsed the basis for confidentiality under section 6103.

This argument breaks down, however, when one closely evaluates the reasonableness of assuming that restricting general law enforcement access to tax information will realistically motivate those who receive illegal income to accurately report and pay their income tax. This notion assumes that drug dealers, fraudulent businessmen, and corrupt politicians will be willing to profit handsomely from their illegal activities and still honestly report and pay their fair share of the tax burden; provided that they can be afforded a modicum of protection from criminal prosecution.

The actual public policy consideration at issue in this area is the protection of the public coffer. This objective includes, but is not limited to, ensuring the effective administration of the tax system. To collect public revenues without also preventing their subsequent theft is as useless as continuously filling a leaking jar. Today, as never before, our country is aware of the price we must pay for poorly managing our public finances. The danger to the economy

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[147] *See* Wilson v. United States, 221 U.S. 361 (1911); United States v. Mackey, 647 F .2d 898 (9th Cir. 1981); *In re* Grand Jury Proceeding, 523 F. Supp. 107 (E.D. Penn. 1981).

[148] See *supra* notes 27–34 and accompanying text.

[149] 5 U.S.C. appendix III, Inspector General Act of 1978, *amended by* Pub. L. No. 97–252 (1982).

[150] United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984).

[151] 15 U.S.C. § 1681a(c) (1982) (defining "consumer" for purpose of the act as an "individual").

[152] 12 U.S.C. § 3401(4) (1982).

[153] See *supra* notes 58–61 and accompanying text.

[154] 465 U.S. 805 (1984). *See also* Fisher v. United States, 425 U.S. 391 (1976); Couch v. United States, 409 U.S. 322 (1973).

[155] The Court noted that the IRS could not effectively administer the tax system without liberal access to financial information, and rejected defendant's argument that the integrity of the securities market would suffer absent some protection for accountant's tax accrual workpapers. 465 U.S. at 815, 818.

[156] *Id.* at 810–11, 818–19.

caused by the huge federal deficit demands that the hemorrage to the public coffer resulting from criminal activities such as fraud and public corruption be sealed.

Recognizing these points, one might more persuasively argue that the Supreme Court in *Arthur Young* recognized the strong public policy consideration in protecting the public fisc and refused to compromise this interest by creating a privilege of confidentiality in order to motivate industry to do that which the federal law already requires them to do, *i.e.,* provide accurate corporate financial statements. Clearly, a similar analysis could be applied to the issue of utilizing tax information in nontax criminal investigations.

Both federal law and civil responsibility require that taxes be accurately declared and fully paid. Considering the stress that illegal economic transactions cause to America's current financial condition, it may be appropriate to reconsider whether we can afford to offer the "motivation" provided by section 6103.

From this perspective, the Supreme Court's continued refusal to recognize an accountant-client privilege was a devastating blow to those seeking to restrict government's access to financial information.

Given the current public concern with the country's rising federal deficit and the increasing public awareness of the price to the nation of lost revenues from nontax fraud and public corruption, it is most likely that the trend towards decreased confidentiality of tax information will continue.

Litigating the Validity of Compulsory Urinalysis Inspections Under Mil. R. Evid. 313(b)

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Introduction

The recent and expanding use of compulsory urinalysis test results as a basis for court-martial proceedings for drug use has made it incumbent upon trial defense counsel to ensure that compulsory urinalysis is conducted pursuant to statute and the requirements of the fourth amendment to the U.S. Constitution.[1]

In 1984, after the Court of Military Appeal's decision in *Murray v. Haldeman*,[2] Mil. R. Evid. 313(b) was amended to expressly permit compulsory urinalysis inspections. The rule now provides that "[a]n order to produce body fluids, such as urine, is permissible in accordance with this rule." Therefore, if a compulsory urinalysis is conducted pursuant to the provisions of Rule 313(b), then the test results are "admissible at trial when relevant and not otherwise inadmissible under these rules."[3] If a urinalysis test does not meet the requirements for Rule 313(b) inspections, then the test results cannot afford the basis of a criminal prosecution, unless the urinalysis can be justified as a probable cause search under Mil. R. Evid. 315.[4] When a compulsory urinalysis fails to qualify as either an inspection or a lawful search, then the government must forego court-martial action and pursue administrative remedies.[5] This article reviews recent developments in military law pertaining to compulsory urinalysis and provides guidance for defense counsel in litigating the validity of compulsory urinalysis tests purportedly conducted under Rule 313(b).[6]

The Inspection Exception

It is axiomatic that the fourth amendment protects soldiers, as well as civilians, from unreasonable governmental intrusion into the security of their "person, house, papers and effects."[7] Government searches ordinarily must be grounded upon a showing of probable cause.[8] Although they involve government intrusion, administrative inspections have long been tolerated in the military as an exception to the requirement of probable cause.[9] The military courts have viewed inspections as reasonable intrusions considering the "exigencies of military necessity and unique conditions that may exist within the military society."[10] The reality is that "[i]t is part of a 'disciplinary cost' to be paid by a citizen soldier in order to 'shoulder his "readiness" burden.' "[11] Rule 313(b), as well as the many pre-rule inspection cases, attempts to strike a delicate balance

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[1] On 28 December 1981, the Deputy Secretary of Defense issued a memorandum to the military services announcing a renewed attack on drug and alcohol abuse and sanctioning the use of compulsory urinalysis test results as a basis of court-martial action. Weisner, *Urinalysis: Defense Approaches*, 15 The Advocate 114 (1983). Army regulations now provide for the use of compulsory urinalysis as a law enforcement tool. Dep't of Army, Reg. No. 600–85, Alcohol and Drug Abuse Prevention and Control Program, para. 3–16*a* (1 Dec. 1981) (I03, 29 Apr. 1983) [hereinafter cited as AR 600–85] provides that "[b]iochemical testing for controlled substances or alcohol is a tool for the commander to use . . . (3) To gather evidence to be used in actions under the Uniform Code of Military Justice (UCMJ)." AR 600–85, para. 1–10*b* (I04, 28 June 1983) states: "Soldiers identified as illegal drug abusers may be considered for disciplinary action under the UCMJ in addition to separation actions." *See* AR 600–85, para. 3–2*d* (I04 28 June 1983). For a critique of the urinalysis program, *see* Neuling, *Urinalysis Reexamined*, The Army Lawyer, Feb. 1985, at 45.

[2] 16 M.J. 74 (C.M.A. 1983).

[3] Mil. R. Evid. 313(a).

[4] *See* United States v. Ouellette, 16 M.J. 911, 913 (N.M.C.M.R. 1983) (compulsory urinalysis permissible as a probable cause search). Urinalysis results are also potentially admissible under Mil. R. Evid. 314 (consent searches, searches within confinement facilities, and other well recognized exceptions to the requirement of probable cause) and Mil. R. Evid. 312(f) (intrusions for valid medical purposes, *see* United States v. Nand, 17 M.J. 936 (A.F.C.M.R.), *petition denied*, 18 M.J. 408 (C.M.A. 1984)).

If compulsory urinalysis testing involves an "extraction of body fluids," then Mil. R. Evid. 312(d) applies: "Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Mil. R. Evid. 315. . . ." The Court of Military Appeals held in *Murray v. Haldeman*, however, that " 'extraction' in Mil. R. Evid. 312(d) does not encompass compelling someone to provide a urine specimen through the normal process of excretion." 16 M.J. at 82 (citing United States v. Wade, 15 M.J. 993, 999 (N.M.C.M.R.), *rev'd on other grounds*, 16 M.J. 115 (C.M.A. 1983)). *Wade* discussed extensively the inapplicability of Rule 312(d) to compulsory urinalysis testing. 15 M.J. at 999–1001. *See* United States v. Nand, 17 M.J. at 937.

[5] Commanders are not required to take disciplinary action against drug abusers. AR 600–85, para. 1–10*b* (I04, 28 June 1983) provides only that "[s]oldiers identified as illegal drug abusers *may* be considered for disciplinary action under the UCMJ in addition to separation actions" (emphasis added). In contrast, administrative separation actions are mandatory. *See* AR 600–85, paras. 1–10*c*, *d*, and 4–25*b* (I04, 28 June 1983).

[6] *See* Wiesner, *Urinalysis: Defense Approaches*, 15 The Advocate 114 (1983); Maizel, *Urinalysis: Search and Seizure Aspects*, 14 The Advocate 402 (1982).

[7] U.S. Const. amend IV. *See, e.g.*, United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979).

[8] Mil. R. Evid. 315(a). *See* United States v. Gebhardt, 10 C.M.A. 606, 610, 28 C.M.R. 172, 176 (1959); United States v. Austin, 21 M.J. 592, 594 (A.C.M.R. 1985).

[9] *See* United States v. Lange, 15 C.M.A. 486, 489, 35 C.M.R. 458, 461 (1965); Mil. R. Evid. 313 analysis at A22–18; Peluso, *Administrative Intrusions*, The Army Lawyer, Sept. 1985, at 24 [hereinafter cited as Peluso] (an excellent discussion of the evolution of inspection precedent).

[10] United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981).

[11] *Id.* at 128. *See* Toth v. Quarles, 350 U.S. 11 (1955).

between the basic constitutional protections afforded citizens and the essential needs of the military.[12] Defense counsel should make every effort to sensitize trial judges to the crucial significance underlying this carefully crafted balance of interests.

The Holding of *Murray v. Haldeman*

In the landmark 1983 decision of *Murray v. Haldeman*,[13] the Court of Military Appeals opened the door for the use of compulsory urinalysis test results in criminal prosecutions. The court concluded for the first time that "[c]ompulsory urinalysis under the circumstances of the present case is justified by the same considerations that permit health and welfare inspections."[14] Prior to *Murray*, there was substantial doubt that the Constitution would permit compulsory urinalysis to afford the basis for a drug-use prosecution.[15]

In *Murray*, a seaman who had been stationed in the Mediterranean was ordered to report to the Philadelphia Naval Base for training at an "A" school (apprentice school). Pursuant to Navy regulation, all seamen were required to submit a urine sample within forty-eight hours after reporting to any "A" school. Significantly, the court noted that "Murray was not singled out to provide a urine sample; instead he was required to provide a sample in the same manner as all other persons reporting for instruction."[16] The government's evidence supporting a charge of wrongful use of marijuana consisted solely of Murray's compulsory urinalysis test results. Murray applied to the Court of Military Appeals for extraordinary relief to prohibit prosecution on the charge. The court, after finding no fifth amendment problem[17] and determining that the manner of obtaining the urine specimen did not violate due process,[18] stated that "the chief issue is compliance with the Fourth Amendment, which shields American servicemembers from unreasonable searches and seizures."[19] In addressing this central issue, the court found that the compulsory urinalysis procedure in question was "similar" to Rule 313(b) inspections and was "justified by the same considerations that permit health and welfare inspections."[20] The court did not say that compulsory urinalysis *was* an inspection, only that it was "similar" to health and welfare inspections and that it enjoyed a similar justification. Thus the limitations inherent in the *Murray* holding, irrespective of whether those limitations exist under Rule 313(b) and in the inspection precedent, are of crucial importance in all compulsory urinalysis cases.

The essential characteristics of the compulsory urinalysis procedure in *Murray* can be summarized as follows:

- the primary purpose was administrative in nature;
- the manner of taking or seizing the urine sample was reasonable and free of due process concerns;
- the urinalysis was conducted uniformly and no one was "singled out";
- the urinalysis was prescheduled to occur upon a fixed event and devoid of subjective command discretion in scheduling; and
- there was no indication of specific reports of drug use of known suspects at the time the test was conducted.

Under *Murray*, urinalysis tests with these attributes and safeguards will meet fourth amendment expectations.[21] To the extent that the language of Rule 313(b) permits the use or urinalysis test results without the safeguards in *Murray*, it is at least arguable that the rule exceeds the *Murray* holding and therefore must be limited in its construction. At a minimum, the circumstances in *Murray* afford important guide posts for the application of the "purpose test" embodied in Rule 313(b).

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[12] *Middleton*, 10 M.J. at 131. *See* United States v. Hillman, 18 M.J. 638, 640 (N.M.C.M.R. 1984).

[13] 16 M.J. 74 (C.M.A. 1983). *See also* United States v. Wade, 15 M.J. 993 (N.M.C.M.R. 1983), *rev'd on other grounds*, 16 M.J. 115 (C.M.A. 1983) (decided shortly before *Murray* and concluding that compulsory urinalysis is permissible under the commander's inherent inspection authority).

[14] 16 M.J. at 82. In *United States v. Wade*, the court concluded: "We have previously stated our view that a command directed urinalysis program, even though compulsory, is encompassed within the inherent Health and Welfare inspection authority of a military commander and is now statutorily embraced within Rule 313(b)." 15 M.J. at 1003.

[15] *See* Maizel, *Urinalysis: The Search and Seizure Aspects*, 14 The Advocate 402 (1982). *See also* United States v. Thomas, 1 M.J. 397 (C.M.A. 1976); United States v. Roberts, 2 M.J. 31 (C.M.A. 1977) (casting doubt on the legality of inspections for contraband drugs).

[16] 16 M.J. at 76.

[17] *See* Schmerber v. California, 384 U.S. 757 (1966) (body fluids are not within the scope of the fifth amendment); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1983) (body fluids are not within the protection of Article 31 or the fifth amendment).

[18] *See* Rochin v. California, 342 U.S. 165 (1952) (stomach pump used to induce vomiting of contraband found to violate due process); United States v. Cameron, 538 F.2d 254 (9th Cir. 1976) (unreasonable intrusion into body cavity). Mil. R. Evid. 312(d) and (e) prohibit extraction of body fluids or intrusive searches of the body by unreasonable means. In United States v. Mitchell, 15 M.J. 937 (N.M.C.M.R. 1983) the court held that Mil. R. Evid. 312(e) did not preclude the admissibility of compulsory urinalysis results where the accused had been ordered to remain in a room and to consume a reasonable and normal amount of fluids in order to facilitate a urinalysis: "The procedure used is clearly and significantly distinct from the procedures symbolized in the above cases [*Rochin, et. al.*] which involve brutality, unreasonable force, or unacceptable invasions of privacy or incursions into the integrity of the human body contemplated in the strictures of M.R.E. 312(e)." *Id* at 940.

[19] 16 M.J. at 81. *See Wade*, 15 M.J. at 1003: "It follows, therefore, that such a urinalysis program, and the seizure incident to its implementation, must be tested by the standards embodied within the Fourth Amendment."

[20] 16 M.J. at 82.

[21] The presence of *sufficient* safeguards assuring that an inspection is not a subterfuge for a search is essential under the fourth amendment to admissibility of evidence derived from the inspection.

> However, we do accept its [Mil. R. Evid. 313(b)] premise that under some circumstances contraband located in the course of a military inspection may be received in evidence. Such evidence is admissible when safeguards are present which assure that the "inspection" was really intended to determine and assure the readiness of the unit inspected, rather than merely to provide a subterfuge for avoiding limitations that apply to a search and seizure in a criminal investigation.

United States v. Middleton, 10 M.J. at 131–32.

Trial defense counsel should be wary that the holding in *Murray* is not interpreted and applied too broadly by military judges. *Murray* does not stand for the proposition that the results of every compulsory urinalysis conducted within the military are admissible as evidence in courts-martial.[22] The court clearly implied that not every compulsory urinalysis would withstand fourth amendment scrutiny. Defense counsel must ensure that Rule 313(b) not be interpreted beyond the parameters of the court's limited holding in *Murray*, which may well dictate a more restrictive construction of Rule 313(b) than the plain meaning of the rule allows.

The Requirements of Rule 313(b)—"The Purpose Test"

To constitute a valid inspection under Rule 313(b), an examination or compulsory urinalysis must have a "primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit." The rule expressly provides that "[a]n examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of the rule." Those types of examinations constitute searches which must comply with all of the attendant constitutional and statutory requirements.[23] The crucial distinction between a permissible inspection and a search is the primary purpose or motive behind the examination.[24] The Army Court of Military Review succinctly articulated this distinction in *United States v. Hay:*[25]

> Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying law enforcement purpose. An inspection is distinguished from a generalized search of a unit or geographic area based upon probable cause in that the latter usually arises from some known or suspected criminal conduct and usually has a law enforcement as well as a possible legitimate inspection purpose.

Under military case law, it is not an inspection within the meaning of Rule 313(b) if the commander's primary purpose is "with a view toward discovering contraband or other evidence to be used in the prosecution of a criminal action."[26] On the other hand, if in fact the *primary motive* for an examination is related to health and welfare, as opposed to law enforcement, and it is otherwise a bona fide inspection, then the government is not precluded from utilizing the fruits of the inspection in a criminal prosecution.[27] Furtherance of a criminal prosecution must be an incidental, secondary motive for an inspection to be considered as a health and welfare measure.

The Primary Purpose Test as Applied to Compulsory Urinalysis

While *Murray* only went so far as to suggest that urinalysis was "similar" to Rule 313(b) inspections, the rule now unequivocably provides that "[a]n order to produce body fluids, such as urine, is permissible in accordance with this rule." Compulsory urinalysis is inherently different from most other types of health and welfare inspections, however, inasmuch as its purpose is always to identify drug users, and thus law violators. With this purpose, it is certainly arguable that compulsory urinalysis always has some predominant law enforcement purpose and can never pass the purpose test mandated by the President in Rule 313(b), as well as in pre-rule inspection cases. To the extent that *Murray* permits compulsory urinalysis in the criminal law context, it perhaps creates the fiction that the identification of drug users can be for valid administrative purposes and is not always investigatory. Nevertheless, compulsory urinalysis, more than other types of inspections, is particularly vulnerable to command misuse as a subterfuge for a probable cause search.[28] Therefore, it is important that each of the safeguarding factors present in *Murray* be shown to have existed as a prerequisite to the admissibility of urinalysis results.[29] Compulsory urinalysis, while similar to Rule 313(b) inspections, is *sui generis* and defense counsel should insist that it be accorded special treatment. It is not merely an inspection, but rather a unique government intrusion justified as an exception to the requirement of probable cause by reason of military necessity.

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[22] *See* United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985); United States v. Heupel, 21 M.J. 589 (A.F.C.M.R. 1985); United States v. Yingling, 20 M.J. 593 (N.M.C.M.R. 1985) (government appeal cases sustaining the suppression of urinalysis results at trial).

[23] *See* Mil. R. Evid. 313 analysis at A22–19

[24] *See, e.g.*, United States v. Lange, 15 C.M.A. 486, 489, 35 C.M.R. 458, 461 (C.M.A. 1965); United States v. Tena, 15 M.J. 728 (A.C.M.R. 1983); United States v. Vincent, 15 M.J. 613, 618-19 (N.M.C.M.R. 1982); United States v. Wilcox, 3 M.J. 863 (A.C.M.R. 1977); United States v. Goldfinch, 41 C.M.R. 500, 503 (A.B.R. 1969); United States v. Coleman, 32 C.M.R. 522, 524 (A.B.R. 1962). *See also* United States v. Barnett, 18 M.J. 166, 169 (C.M.A. 1984); United States v. Law, 17 M.J. 229, 236–40 (C.M.A. 1984) (Mil. R. Evid. 313(c) inventory cases applying the purpose test).

[25] 3 M.J. 654, 656 (A.C.M.R. 1977), *cited with approval in* United States v. Brown, 12 M.J. 420, 423 n.1 (C.M.A. 1982); United States v. Middleton, 10 M.J. at 127 n.7.

[26] United States v. Lange, 15 C.M.A. at 489, 35 C.M.R. at 461; Mil. R. Evid. 313 analysis at A22–19–20

[27] Mil. R. Evid. 313(a). *See* United States v. Middleton, 10 M.J. at 131–32; United States v. Austin, 21 M.J. at 594–95.

[28] All contraband inspections are highly susceptible to command abuse and must be closely scrutinized for an actual law enforcement purpose.

> The Rule [313(b)] applies special restrictions to contraband inspections because of the inherent possibility that such inspection may be used as subterfuge searches. . . . The fact that possession of contraband is itself unlawful renders the probability that an inspection may be a subterfuge somewhat higher than that for an inspection not intended to locate such material.

Mil. R. Evid. 313(b) analysis at A22–20. Compulsory urinalysis is particularly vulnerable to abuse inasmuch as it inherently seeks to identify law violators. Other contraband inspections do not necessarily involve the identification of the person criminally responsible. With compulsory urinalysis there is an absolute nexus between the evidence and the violator.

[29] In United States v. Hilliman, 18 M.J. 638, 640 (N.M.C.M.R. 1984), the Navy court, in considering alleged defects in the urinalysis collection procedure, stated:

> We all agree that when the government proceeds on a charge alleging drug usage based solely upon evidence obtained by non-consensual methods a special scrutiny of that evidence and the means of obtaining it must be made. We are balancing two very important principles: the individual rights of a United States citizen in the armed forces; and the important national security needs of this nation to rely on a military force unaffected by drug usage.

It is absolutely essential to admissibility that the commander ordering a urinalysis espouse a primary health and welfare purpose. Should he or she express a primary law enforcement purpose, beyond the inherent purpose of identifying drug users, the compulsory urinalysis cannot constitute a valid inspection. Indeed, the primary purpose test is grounded in the subjective motivation of the commander.[30] If the commander states that his or her primary purpose is law enforcement related, that should be dispositive of the issue under both Rule 313(b) and *Murray*.[31]

In most cases, the commander will enunciate an administrative motivation for the identification of drug users in the unit, *i.e.*, health and safety. The expressed motivation is, of course, some evidence of a valid primary purpose, but the factual inquiry into the commander's purpose should not end with this bare assertion of propriety. The determination of primary purpose is a factual question to be resolved by the military judge.[32] Trial defense counsel should, as with any other factual issue, attempt to elicit facts suggesting a primary law enforcement purpose. Moreover, it is at this juncture that the factors present in *Murray* are highly significant, if not controlling. Trial defense counsel should urge that all of the safeguarding factors in *Murray* must be present in order for the primary purpose to be deemed administrative in nature. In essence, *Murray* should afford the legal standard for the factual determination.

Most significantly, trial defense counsel should argue that a commander's ordering of a urinalysis after receiving a report of drug abuse precludes the use of the test results in a criminal prosecution.[33] Objective prescheduling was central to the court's holding in *Murray*. Without the presence of this prescheduling safeguard, a compulsory urinalysis should not be deemed administrative in nature. Similarly, test results should not be used in a prosecution where the accused has been subjectively selected for urinalysis.[34] In *Murray*, the accused was not "singled out" and the urinalysis was conducted uniformly. In view of the high potential for misuse in compulsory urinalysis cases, it is essential that all of the *Murray* factors be present to assure that the examination was an actual administrative inspection, as opposed to a subterfuge for a probable cause search. Otherwise, the risk is simply too great that, despite the commander's assertions to the contrary, the primary purpose is actually law enforcement related.

Burden of Proof

Generally, once the issue is raised the government has the burden of showing the validity of a urinalysis inspection conducted pursuant to Rule 313(b) by a preponderance of the evidence.[35] The rule increases the burden of proof, however, where it appears that the inspection is a subterfuge for a search:

> If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule.

While the presence of drug traces in a soldier's urine is not normally referred to as contraband,[36] it is both logical and consistent with the intent and purpose of Rule 313(b) that the burden escalator clause be applied to urinalysis inspections as well as other contraband inspections.[37]

Conclusion

While similar to a Rule 313(b) contraband inspection, compulsory urinalysis is *sui generis* and potentially more vulnerable to command misuse as a subterfuge for a search. This potential for command abuse requires that compensating safeguards be present which are not necessarily required in contraband inspection cases. The presence of specific safeguarding factors was central to the Court of Military Appeal's sanctioning the use of urinalysis results in criminal cases. Trial defense counsel must ensure that the government does not exceed the scope of the authority granted by *Murray*.

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[30] *See* United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985). For a discussion of the pros and cons of the purpose test, *see* H. Moyer, Justice and the Military § 2-188 (1972). It is now well settled "that it is the *primary* purpose of the commander which controls whether an administrative intrusion is valid or merely a pretext for a search." Peluso, *supra* note 9, at 27.

[31] *See United States v. Austin.*

[32] *Id.*; United States v. Wade, 15 M.J. 993, 998 (N.M.C.M.R. 1983). *See* United States v. Barnett, 18 M.J. at 171; United States v. Lange, 15 C.M.A. at 491, 35 C.M.R. at 463 (Quinn, J., dissenting).

The characterization of the primary purpose determination as factual is particularly important for the purpose of government appeals under Uniform Code of Military Justice, art. 62, 10 U.S.C. § 862 (1982) [hereinafter cited as UCMJ]. In such appeals, the Courts of Military Review are bound by the factual determination made by the military judge, unless his or her findings are incorrect as a matter of law. UCMJ art. 62. For the proper standard of appellate review as to factual issues in Article 62 cases, *see* United States v. Burris, 21 M.J. 140, 143-45 (C.M.A. 1985); United States v. Austin, 21 M.J. at 596-97.

[33] *See* United States v. Heupel, 21 M.J. 589 (A.F.C.M.R. 1985) (upholding military judge's application of Mil. R. Evid. 313(b)(1) in suppressing compulsory urinalysis results); Mil. R. Evid. 313(b)(1).

[34] *See* Mil. R. Evid. 313(b)(2) and (3).

[35] Mil. R. Evid. 311(e)(1)

[36] "Contraband is defined as material the possession of which is by its very nature unlawful." Mil. R. Evid. 313 analysis at A22-20.

[37] *See* United States v. Heupel, 21 M.J. at 590-91.

New Developments

Rights Warnings

In *Oregon v. Elstad,*[1] the Supreme Court rejected a "cat-out-of-the-bag" analysis and held that a technical violation of *Miranda v. Arizona,*[2] *i.e.,* the investigator did not first read the suspect his rights before obtaining a voluntary statement, did not require the suppression of subsequent uncoerced statements made after a rights advisement. The Army Court of Military Review, in *United States v. Ravenel,*[3] adopted the same position with respect to statements taken in the absence of an Article 31[4] rights advisement. More recently, however, another panel of the Army court looked at the same issue in a different factual setting in *United States v. Kruempleman*[5] and reached the opposite result. The accused in *Kruempleman* responded to unwarned questioning during a health and welfare inspection. He was then questioned, after rights warnings, by his company commander and then by a military police investigator, all within a two-hour period while he was in custody of military authorities. The Army court concluded that the "subtle pressures" of military society were operative, under the facts of this case, and thus an "inherently coercive atmosphere" surrounded the taking of the initial statement which tainted the subsequent statements as well.[6] Thus *Oregon v. Elstad* does not necessarily answer the issue of the impact of "technical" violations of Article 31 on subsequent, voluntary, warned statements. The critical factor is to establish for the record the uniquely military, albeit subtle, pressures brought to bear on the accused who makes subsequent statements after proper warnings.

Credit for Pretrial Restraint

In *United States v. Gregory,*[7] the appellant was placed under pretrial restriction. On a defense motion at trial, the military judge found the restriction tantamount to confinement and ordered day-for-day credit in accordance with *United States v. Allen.*[8] The defense then requested additional administrative credit under Rule for Courts-Martial 305(k).[9] The military judge denied this motion. The Army Court of Military Review found that "the effect which restriction tantamount to confinement has upon an appellant is the practical equivalent of the effect which occurs from a similar period of actual pretrial confinement," and held that restriction tantamount to confinement is a form of pretrial confinement and that the provisions of R.C.M. 305 should apply.[10] The Court then granted R.C.M. 305 day-for-day credit to be applied against the appellant's approved sentence[11] in addition to the day-for-day credit granted pursuant to *Allen.*

Custodial Interrogation

A case involving application of the bright line rule of *Edwards v. Arizona,*[12] to custodial questioning by a company commander was recently decided by the Army Court of Military Review. In *United States v. Reeves,*[13] the accused invoked his right to counsel during custodial questioning by a Criminal Investigation Division (CID) agent. Several hours later, during inprocessing at a pretrial confinement facility, Reeves was approached by his company commander. The commander read Reeves his rights and obtained a confession. The Army Court of Military Review initially held that the confession was obtained after a knowing and intelligent waiver.[14] The Court of Military Appeals granted Reeves' petition for review on the *Edwards* issue and remanded the case to the Army court to consider the government's contention that the company commander appeared at the stockade for a purpose unrelated to law enforcement and that, in any case, the admission of the statement was harmless.[15] While both Chief Judge Everett and Judge Cox joined in the decision to remand the case, their separate opinions reflected differing views on the applicability of the *Edwards* rule to military investigations and the propriety of recognizing a good faith exception. On remand, the Army Court of Military Review rejected the government's contention that the rule of *Edwards* did not

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[1] 105 S. Ct. 1285 (1985).

[2] 384 U.S. 436 (1966).

[3] 20 M.J. 842 (A.C.M.R. 1985).

[4] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831(b)(1982).

[5] SPCM 21467 (A.C.M.R. 31 Dec. 1985).

[6] *Id.,* slip. op. at 3.

[7] SPCM 21274 (A.C.M.R. 6 Jan. 1985).

[8] 17 M.J. 126 (C.M.A. 1984). Although the military judge termed this credit as *Allen* Credit, it should more aptly be termed *Mason* credit. *See* United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

[9] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(k) [hereinafter cited as R.C.M.].

[10] *Gregory,* slip op. at 5. The Army court has since requested briefs on the issue of whether, in the future, failure to request R.C.M. 305 credit at trial will constitute waiver. United States v. Ecoffey, CM 447363 (A.C.M.R. 7 Jan. 1986).

[11] This also resolved the question of whether the credit should be applied to the adjudged sentence or the approved sentence.

[12] 451 U.S. 477 (1981).

[13] 17 M.J. 832 (A.C.M.R.), *petition granted* 19 M.J. 53 (C.M.A. 1984).

[14] United States v. Reeves, 17 M.J. 832 (A.C.M.R. 1984). Appellate defense counsel moved the Army court to reconsider the decision. The court refused to reconsider, explaining that Reeves was not in police custody within the meaning of *Edwards.* United States v. Reeves, CM 443401, slip op. at 1 (A.C.M.R. 29 Feb. 1985).

[15] United States v. Reeves, 20 M.J. 234 (C.M.A. 1985).

apply to questioning by commanders,[16] concluding that such an exception to *Edwards* "would not promote fundamental fairness in the military justice system."[17] The Army court then addressed several specific factual issues and determined that the commander was not engaged in a law enforcement function when he questioned Reeves, and that the CID agent who received Reeves' request for counsel was at least negligent for failing to pass it on to his commander. Finally, the Army Court held that error in admitting Reeves' confession was not harmless.[18]

Joint Possessor Exception

The Army Court of Military Review, in *United States v. Allen,*[19] recognized the "joint possessor" exception in drug distribution offenses to find a plea of guilty to the offense of possession with intent to distribute improvident. This exception provides that the transfer of a controlled substance between individuals who simultaneously acquired and jointly possessed the substance constitutes simple possession rather than distribution. Adopting the reasoning of the Court of Appeals for the Second Circuit in *United States v. Swiderski,*[20] the Army court based the exception on the rationale that simple joint possession and personal use of a controlled substance does not pose any of the evils "of drawing additional participants into the web of drug abuse . . . which Congress sought to deter and punish through more severe penalties provided for those engaged in drug distribution."[21] It should be noted that the holding in *Allen* turned on the providency of the plea inquiry where the appellant admitted that he intended to distribute the marijuana back to the joint possessor but there was no evidence that the appellant or the joint possessor intended to distribute to a third party. Notwithstanding the large amount (265 grams) of marijuana that appellant admitted to possessing, the Army court refused to infer that the appellant and the joint possessor intended to distribute the drug to other persons.[22] The Court specifically noted, however, that "[s]uch an inference could . . . defeat an accused's reliance upon the *Swiderski* defense [in a contested case]."[23]

Negligent Homicide

The Supreme Court has denied certiorari in *United States v. Spicer,*[24] which challenged the validity of the offense of negligent homicide under Article 134. Two other pending petitions for certiorari[25] were also denied. An important reminder to note is the critical need to fully litigate at trial the *constitutional* basis for an argument if the door to the Supreme Court is to be kept ajar.

Unlawful Command Influence

A final note of interest: four cases[26] raising the issue of unlawful command influence by Major General Anderson in the 3d Armored Division were argued[27] at the Court of Military Appeals on 31 January 1986. Captain AnnaMary Sullivan, Captain David W. Sorensen, Captain Bernard P. Ingold, and Captain Lorraine Lee.

Length of Pretrial Confinement

Military judges are comfortable with the rule established in *United States v. Burton,*[28] requiring that an accused in pretrial confinement be brought to trial within ninety days.[29] Cases after *Burton* indicate that a presumption of prejudice created by more than ninety days of pretrial confinement can be rebutted by a showing of extraordinary reasons explaining why the accused was not brought to trial.[30] Under those precedents, extraordinary circumstances may justify pretrial confinement beyond 100 days.

Rule for Courts-Martial 707(d) established a similar but distinguishable rule. It requires immediate steps to bring to trial an accused in pretrial arrest or confinement. It specifically provides, however, that "no accused shall be held in pretrial arrest or confinement in excess of 90 days. . . . The military judge may, upon showing of extraordinary circumstances, extend the period by 10 days." This rule sets a limit at 100 days of pretrial confinement.[31]

Military judges are inclined to follow the traditional rule and permit pretrial confinement beyond 100 days upon a showing of extraordinary circumstances. Defense counsel

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[16] United States v. Reeves, CM 443401 (A.C.M.R. 10 Dec. 1985). The court's memorandum decision will be published as an appendix to the order subsequently issued by the Court of Military Appeals. United States v. Reeves (C.M.A. 31 Dec. 1985).

[17] *Id.*, slip op. at 2.

[18] The case was returned to the Court of Military Appeals for final disposition and that court subsequently set aside the findings and sentence in an order of the court. United States v. Reeves (C.M.A. 31 Dec. 1985) (summary disposition).

[19] CM 446768 (A.C.M.R. 17 Jan. 1986).

[20] 548 F.2d 445 (2d Cir. 1977).

[21] *Allen,* slip op. at 3n.1.

[22] *Id.*

[23] *Id.*

[24] CM 443478 (A.C.M.R. 21 May 1984), *petition granted and decision below summarily aff'd,* 20 M.J. 188 (C.M.A. 1985).

[25] United States v. Holman, 19 M.J. 784 (A.C.M.R. 1984), *petition granted and decision below summarily aff'd,* (C.M.A. 8 Oct. 1985); United States v Hershey, 17 M.J. 973 (A.C.M.R. 1984), *aff'd,* 20 M.J. 433 (C.M.A. 1985).

[26] United States v. Thomas, CM 443527 (A.C.M.R. 2 Aug. 1985); United States v. Gonzales, CM 444804 (A.C.M.R. 25 Jun. 1985); United States v. Giarratano, SPCM 20588 (A.C.M.R. 18 Mar. 1985); United States v. Cook, CM 444195 (A.C.M.R. 31 Oct. 1984).

[27] *Petition granted and argument ordered* (C.M.A. 17 Jan. 1986).

[28] 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[29] Although United States v. Burton, established a three month rule, United States v. Driver, 23 C.M.A. 243, 49 C.M.R 376 (1974), makes clear that it is a 90-day rule.

[30] *See, e.g.,* United States v Groshong, 14 M.J. 186 (C.M.A. 1982); United States v. Talavera, 8 M.J. 14 (C.M.A. 1979); United States v. Henderson, 1 M.J. 421 (C.M.A. 1976).

[31] *See* United States v. Durr, 21 M.J. 576 (A.C.M.R. 1985).

should, therefore, utilize the rule change to move for dismissal in any case where the government is accountable for more than 100 days of pretrial confinement.[32] Defense counsel may also move for dismissal on traditional *Burton* grounds when accountable pretrial confinement exceeds 90 days but is less than 100 days.[33] Captain Richard J. Anderson

[32] R.C.M. 707(e).

[33] *See* R.C.M. 707(d) discussion.

Processing Time in Cases Reaching the Court of Military Appeals

To permit response to a congressional inquiry, the Court of Military Appeals recently compiled information on the processing time of cases reaching the court. The statistics were derived from 14,000 cases from all services which were entered into the court's information management system from 1 October 1980 through 30 September 1985.

Portions of the information are shown in the table below. There are some distortions in the figures due to several factors, including entering data as to only the second convening authority action in cases remanded by the courts of military review. Nevertheless, the table affords a reasonably reliable guide as to the time required by the appellate processes over the last five fiscal years.

The Army cases reflected in these averages represent somewhat less than 50% of the 13,469 cases decided by the Army Court of Military Review in Fiscal Years 1981–1985. Accordingly, the Court of Military Appeals averages differ from those reflected in overall Army Judiciary statistics. When all Army cases are included, the average time from sentence to action was 53.1 days, rather than 70.9; the average period from convening authority action to ACMR decision was about 180 days rather than 232 days. Those differences illustrate the fact that cases reaching the Court of Military Appeals are usually the more complex contested cases that have required more time in the initial review, appellate briefing, and appellate decision stages.

Although the future of any one case may be unpredictable, it is possible to generalize from the above information. Of each 100 convictions reviewed by the Army Court of Military Review, one-half will become final at that stage and one-half will be petitioned or otherwise come before the Court of Military Appeals. Of those 50, 45 will become final by denial of the petition for review. Of the five Army cases reviewed, four will be decided without oral argument about twenty-two months after sentencing, but the one case orally argued may require an additional eleven months in the appellate process.

	Average Days All Services	Average Days Army Cases	Number of Army Cases
Sentence to Convening Authority (CA) Action	88.6	70.9	5,334
CA Action to CMR Decision	199.4	231.7	5,777
CMR Decision to CMA Filing	84.7	61.7	6,453
CMA Filing to Petition Grant	109.1	107.8	623
CMA Filing to Petition Denial	76.0	79.8	5,792
Petition Grant to Oral Argument (OA)	353.5	344.6	159
Oral Argument to CMA Decision	169.9	174.0	151
Petition Grant to Decision w/o OA	203.6	201.2	601

Military Justice Statistics, FY 1983–1985

Table 1
Nonjudicial punishment information

	FY 1983	FY 1984	FY 1985
Persons Punished	132,045	113,914	121,153
Rate per 1,000 Soldiers	168.6	144.7	154.0
Percent Formal	78%	76%	78%
Percent Trial Demanded	.9%	.8%	.7%
Percent Appealed	8%	7%	7%
Percent Relief Granted	16%	15%	15%

Table 2
Number of courts-martial (with rates per thousand in parentheses)

	FY 1983	FY 1984	FY 1985
GCM	1,588 (2.0)	1,442 (1.8)	1,420 (1.8)
BCDSPCM	2,082 (2.7)	1,403 (1.8)	1,304 (1.7)
SPCM (Non-BCD)	777 (1.0)	461 (0.6)	363 (0.5)
SumCM	2,856 (3.6)	1,645 (2.1)	1,308 (1.7)
	7,202 (9.3)	4,951 (6.3)	4,395 (5.7)

Table 3
Type and result of trials—General Courts-Martial

FY	Number	Judge Alone	Court Members Number	(%Enl)	Guilty Pleas	Conviction Rate
1983	1,588	1,069 (67%)	519 (33%)	(54%)	58%	95%
1984	1,442	1,000 (69%)	442 (31%)	(49%)	60%	96%
1985	1,420	979 (69%)	441 (31%)	(56%)	67%	96%

Table 3–1
BCD Special Courts-Martial

FY	Number	Judge Alone	Court Members Number	(%Enl)	Guilty Pleas	Conviction Rate
1983	2,082	1,542 (74%)	540 (26%)	(52%)	57%	96%
1984	1,403	1,074 (77%)	329 (23%)	(56%)	57%	95%
1985	1,304	980 (75%)	324 (25%)	(56%)	63%	95%

Table 3–2
Special Courts-Martial (Non-BCD)

FY	Number	Judge Alone	Court Members Number	(%Enl)	Guilty Pleas	Conviction Rate
1983	777	527 (68%)	250 (32%)	(53%)	46%	92%
1984	461	293 (64%)	168 (36%)	(67%)	43%	87%
1985	363	225 (62%)	138 (38%)	(40%)	41%	80%

Table 3–3
Summary Courts-Martial

FY	Number	Guilty Pleas	Conviction Rate
1983	2,856	Not Aval.	92%
1984	1,645	Not Aval.	92%
1985	1,308	Not Aval.	92%

Table 4
Impact and disposition of drug offenses—Percent of cases involving drug offenses

Forum	FY 1983	FY 1984	FY 1985
GCM	48%	41%	46%
BCDSPCM	43%	37%	37%
SPCM (Non-BCD)	16%	15%	14%
SumCM	18%	14%	14%
Article 15	14%	12%	19%

Table 4–1
Number of drug offenders tried or nonjudicially punished (with number convicted shown in parentheses)

Forum	FY 1983	FY 1984	FY 1985
Tried by GCM	757 (721)	587 (568)	654 (618)
Tried by BCDSPCM	893 (843)	518 (481)	484 (429)
Tried by SPCM (Non-BCD)	124 (102)	68 (60)	52 (36)
Tried by SumCM	492 (428)	232 (206)	177 (158)
Punished under Art. 15	18,115	14,220	22,592
Totals	20,381	15,625	23,959
Rate per 1000 soldiers	26.0	19.8	30.5

Table 4–2
Type of disposition of drug offenders (conviction rates shown in parentheses)

Forum	FY 1983	FY 1984	FY 1985
Tried by GCM	3.7% (95%)	3.8% (97%)	2.7% (94%)
Tried by BCDSPCM	4.4% (94%)	3.3% (93%)	2.0% (89%)
Tried by SPCM (Non-BCD)	.6% (82%)	.4% (88%)	.2% (69%)
Tried by SumCM	2.4% (87%)	1.5% (89%)	.7% (89%)
Subtotal: Percent Tried	11.1%	9.0%	5.7%*
Given Formal Art. 15	85.6%	89.2%	93.2%
Given summzd Art. 15	3.2%	1.8%	1.1%
Totals	99.9%*	100.0%	100.0%

*Totals vary due to rounding

Table 5
Percentage of convictions in which punitive discharge adjudged

	FY 1983		FY 1984		FY 1985	
	Drug	Others	Drug	Others	Drug	Others
GCM	94.3	84.7	95.6	82.7	95.3	81.1
BCDSPCM	77.6	66.6	81.1	63.0	76.9	66.7

Trial Judiciary Note

Sentence Arguments: A View From the Bench

Major Jody Russelburg
Military Judge, Fifth Judicial Circuit, Stuttgart, FRG

The accused has been found guilty and all of the evidence for sentencing has been presented. It has been a difficult case to try, but counsel for each side is satisfied with the way in which he or she has presented the case. Counsel at this point might feel that his or her job is finished and that it is up to the military judge or the court members to do their job to determine an appropriate sentence for the accused. But it is not "Miller time" yet; the attorney who is content to make only a few cursory remarks or who makes an unfocused argument on sentence is wasting a valuable opportunity to persuade the sentencing authority to reach a result that counsel believes to be appropriate.

Most judges and court members believe that determining an appropriate sentence is far more difficult than determining the finding of guilty or not guilty. Findings are made by

applying an established standard of proof beyond a reasonable doubt to the evidence presented. The fact finder either has or does not have a reasonable doubt, and the decision on findings is made accordingly. No comparable standard exists to determine the sentence. The judge or the court members must take the range of permissible punishments and find the single sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society. In many cases, these competing interests are seemingly irreconcilable. One interest may be accepted by the sentencer as the dominant interest to be best satisfied by the sentence adjudged. Counsel can influence this process by making a persuasive argument to support a conclusion that, in a particular case, one interest is predominant. If that argument is accepted, the desired sentence will flow naturally from that conclusion.

In every case there is a maximum sentence that can be adjudged. Within that limit, the appropriate sentence may be the maximum sentence or any lesser legal sentence, including a sentence to no punishment. Except in a few cases, neither the maximum sentence nor a sentence to no punishment is an appropriate sentence. Nevertheless, in a significant number of cases, government counsel argue for a maximum sentence or defense counsel argue for a sentence of no punishment. Sometimes these diametrically opposed arguments are made in a single case. Often, these arguments are not supported by the evidence and counsel make no effort to support the argument beyond stating that crime (or this particular crime) is "bad" or the accused is a good person or a good soldier. Such arguments appear to be nothing more than "knee jerk" arguments in favor of an extreme result most favorable to the side making the argument. These unsupported arguments for a lopsided result are neither persuasive nor helpful to the fact finder and result in counsel wasting the opportunity to meaningfully influence the determination of the appropriate sentence.

There is nothing unethical, unprofessional, or improper about counsel arguing for a sentence which is something other than the most favorable possible result for his or her client. Of course, defense counsel cannot properly argue for a sentence which is contrary to the desires of the client, and a defense counsel should discuss his or her intent to argue for a particular sentence or a particular type of punishment with the client. If the accused understands that some punishment is a probable consequence of conviction and that the sentencing procedure is a "damage control" operation for the defense, he should be able to accept his counsel's decision to make an argument in support of a level of punishment which counsel believes to be advantageous, or at least acceptable under the circumstances. Similarly, counsel for the government should realize that unless a case has been under-referred or the facts of the case are especially aggravated, he or she is not likely to get a "max" sentence. Trial counsel will do better to make a realistic assessment of the case and presents an argument to support this concept of an appropriate sentence. If counsel believes that a particular result is appropriate, he or she should argue for that result and provide a reasoned explanation of why he or she regards that result as appropriate. Counsel for each side should try to convey a sense of reasonableness in this assessment of an appropriate sentence. The sentence argued for by counsel should be perceived as a carefully considered conclusion rather than as a randomly selected result. If a defense counsel concludes that confinement is probable based on the facts of the case, he or she is further ahead to argue for a minimum period of confinement than to argue futilely for no confinement. If trial counsel sees that confinement or a punitive discharge is not likely to be a part of the sentence, he or she should focus his or her argument on other punishments rather than wasting the opportunity by arguing for something he or she is not going to get.

The subject of this article is sentence arguments, not how to present a case in aggravation or extenuation and mitigation. Arguments cannot be discussed, however, without at least briefly considering the evidence in the case. The content and tone of the sentence argument has to be drawn from the nature of the offense or offenses and the evidence presented by each side. The decision on what evidence to offer should be made with a view to how the evidence will fit into the argument to be made at the conclusion of the evidence. It is always appropriate for the defense to put the accused in the most favorable light possible. It must be recognized, however, that an accused who has just been convicted of rape and murder is not likely to benefit significantly from the fact that he has always had highly polished boots and a neat haircut. The defense counsel who stands up to argue for leniency in such a case better have more to support that argument than the condition of the accused's boots if he or she hopes to be successful on behalf of the client. In preparing for sentence argument, counsel must make some logical connection between the evidence in the case and the sentence which he or she considers to be appropriate. A neat appearance as a soldier or testimony about outstanding duty performance will probably not keep an accused from being confined for a serious offense, but it might be argued successfully as evidence that the accused has pride in his status as a soldier. This may reflect favorably on the accused's character and sense of responsibility and may form the basis for arguing for a lesser period of confinement or a sentence that will leave the accused with some income to meet financial responsibilities. To reach the desired result, counsel must draw the facts from the evidence, use those facts favorable to their case to support their position on an appropriate sentence, and address the adverse facts to blunt the anticipated arguments of opposing counsel.

When counsel concludes the argument on sentence, the military judge or the court members should have some emotional response to the argument. Counsel should seek to evoke some feeling such as anger, sympathy, empathy, concern, sadness, or compassion. This response should be based on a reasoned emotion, not the "inflamed passion" created by a pure appeal to emotion. If the trial counsel is seeking a severe sentence, he or she must be able to produce a sense of the outrageousness of what the accused did or a realization of the impact of the accused's conduct on a particular victim or on society. An argument which merely states that what the accused did was bad, without any emphasis on why it was bad, does nothing more than state the obvious. Defense counsel should create a feeling of compassion or understanding toward the client, a sense that although what the accused did was wrong, his criminal conduct was an aberration, it is not likely to recur, and despite the conviction, the accused is basically a decent person with many good qualities and rehabilitative potential. The defense counsel's job is to make it as difficult as possible for

the sentencing authority to treat the client severely. The trial counsel's job is to make the sentencing authority recognize that it must make the difficult decision to adjudge a substantial punishment despite any feeling of sympathy the court might have for the accused or his family. If the argument of counsel leaves the court without an emotional response, the argument has not accomplished all that it should have accomplished.

Finally, it is useful for counsel to appreciate their audience, especially when presenting an argument to court members. Court members are soldiers. They are usually career officers or senior noncommissioned officers; counsel should understand the values held by such a homogeneous group. If counsel knows the general values of the military community, he or she can appeal to those values in an argument which explains why a particular punishment or sentence is in accord with the values of the society. For example, when addressing the appropriateness of a punitive discharge, counsel should explain why such a discharge is or is not consistent with the need to preserve good order and discipline in the Army and discuss whether adjudging such a discharge is in the best interests of either the accused or the military. In some cases, it may be helpful to put the determination of an appropriate sentence in the context of military terms that are familiar to the court members. For example, when discussing how much punishment is necessary in a case, counsel can draw an analogy to a principle of war such as economy of force. Explain that just as it wastes resources to send a battalion to perform a mission which could be accomplished by a platoon, it also would be a waste of resources to adjudge a sentence which is excessive to accomplish the purposes of punishment. Arguments such as this may give the court members a better perspective on their responsibilities as the sentencing authority.

The circumstances of each case and the personal style of each counsel determine what constitutes an effective argument on sentence. Counsel should always appreciate the importance of their role as advocates in sentence arguments and avoid the tendency to fall into a pattern of pro forma or "knee jerk" arguments on sentence. If, after a realistic assessment of the case, counsel or client is disappointed in the sentence adjudged, it may be because counsel failed to persuade the military judge or the court members that a different result was more appropriate.

Trial Defense Service Note

Client Perjury: Practical Suggestions for Defense Counsel

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Introduction

Safeguarding a client's passage through the military justice system is obviously a difficult task for a defense counsel. One thing a lawyer does not need is another obstacle thrown in the path. Each case has problems that a lawyer must overcome, and the client may be the cause of some of those problems. One particular problem, however, has the potential for causing devastating results, both for the client and for the defense counsel: the client who wants to commit perjury.

The purpose of this article is to provide practical guidance for the trial defense counsel when faced with a client who wants to lie on the witness stand. After the fundamental principles of the rules and the law are identified, a specific methodology will be outlined. Finally, the impact of potential changes in the law will be discussed.

Current Rules

In the Army, the American Bar Association's Model Code of Professional Responsibility is the key starting point for analyzing issues of legal ethics. Although the ABA has adopted the new Model Rules of Professional Conduct, these rules have not yet been applied to Army court-martial practice.[1] Disciplinary Rule (DR) 7–102(A)(4) of the Model Code establishes the basic rule that, in representing a client, a lawyer shall not "[k]nowingly use perjured testimony or false evidence."[2] If the lawyer does not learn that his or her client's testimony was false until after the client has testified, DR 7–102(B)(1) provides that the lawyer "shall promptly call upon his client to rectify" the fraud, and if the client refuses, the lawyer "shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication."[3]

The ABA Standards for Criminal Justice specifically address the problem of perjury committed by a defendant. The relevant standard was adopted by the ABA's House of Delegates in 1971.[4] Although a modified version of this

[1] "The Code of Judicial Conduct and the Model Code of Professional Responsibility of the American Bar Association are applicable, as set forth in AR 27–1, to judges and lawyers involved in court-martial proceedings in the Army. . . ." Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 5–8 (1 July 1984) [hereinafter cited as AR 27–10]. *See also* Gaydos, *Client Perjury: A Guide for Military Defense Counsel*, The Army Lawyer, Sept. 1983, at 13.

[2] Model Code of Professional Responsibility DR 7–102(A)(4) (1980) [hereinafter cited as Model Code].

[3] Model Code DR 7–102(B)(1).

[4] ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, section 7.7 (1971) [hereinafter cited as ABA Standard 7.7].

standard has been proposed,[5] the Court of Military Appeals has specifically held that the 1971 ABA Standard applies to military courts-martial.[6] The standard is triggered when the accused makes inculpatory admissions that he later disavows. The first obligation of defense counsel is to investigate to see if the original admissions are established as true. If so, the defense counsel must advise the client against taking the witness stand to testify falsely. If this persuasive effort is unsuccessful, the lawyer must withdraw from the case, if possible. If counsel must remain on the case, he or she should make a record of the fact that the accused is taking the witness stand against the advice of counsel, without revealing that fact to the court. When the client takes the stand, the defense counsel's direct examination will be confined to identifying the witness as the accused, and then permitting the accused to make a narrative statement. Counsel may not engage in any conventional direct examination regarding the perjured portion of the testimony, may not argue the known false testimony as worthy of belief, and may not recite or rely upon the false testimony in the closing argument.[7]

Two military appellate opinions have addressed the problem of client perjury. In addition to holding the ABA Defense Standard applicable to the military, the case of *United States v. Radford* is valuable because it identifies actions that counsel must not take. In that case, it was clear from counsel's statements in front of the members that there was a dispute between counsel and client concerning the nature of the accused's testimony.[8] In *United States v. Roberts*,[9] the Army Court of Military Review found that the military judge, in a judge alone trial, was tainted because the accused's original defense counsel expressed his belief to the judge that the client was going to commit perjury.[10] It seems clear that counsel must handle the problem of client perjury without tainting the court and without revealing the nature of privileged communications.

Suggested Methodology

Identify the problem

A defense counsel need not worry about his or her ethical responsibilities in this area, of course, unless truly faced with a client that the lawyer believes will commit perjury. At first glance this appears to be an easy problem to identify, but this may not be the case. An Eighth Circuit opinion, *Whiteside v. Scurr*,[11] currently under review by the Supreme Court, states:

> Mere suspicion or inconsistent statements by the defendant alone are insufficient to establish that the defendant's testimony would [be] false. . . . Counsel must act if, but only if, he or she has "a firm factual basis" for believing that the defendant intends to testify falsely or has testified falsely. . . . It will be a rare case in which this factual requirement is met. Counsel must remember that they are not triers of fact, but advocates.[12]

At one point in *Radford*, the Court of Military Appeals mistakenly stated the problem in terms of when the lawyer "believes" that the client will commit perjury.[13] The ethical standards endorsed in *Radford* make clear that defense counsel obligations are actually triggered by the accused's inculpatory admissions. The subjective beliefs of defense counsel about the truth or falsity of the accused's potential testimony is irrelevant to related ethic standards absent this triggering circumstance.

Even this standard contains some grey areas. The clearest case is when a client openly admits to counsel that he or she intends to lie, such as when the client has told the lawyer that he or she is guilty, but intends to deny guilt on the witness stand. The false testimony, however, might have nothing to do with the fundamental issue of guilt versus innocence. For example, a client may continually maintain innocence, but may want to falsely explain away the significance of some evidence in the case.[14]

The rules are also clear that a client need not openly admit that he or she intends to lie. Clients sometimes change their stories. If, for example, a client has admitted guilt, but later says he was wrong and really is innocent, the lawyer must follow the ethical guidelines. The ABA Defense Standard requires the lawyer to conduct an investigation to determine whether the original admissions were true.[15] If counsel then believes that the client intends to lie, he or she must take action, even if the client's new story also fits the facts of the case. If the lawyer is to make a mistake in this regard, this author recommends that the lawyer err on the side of avoiding the appearance of ethical impropriety.

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[5] ABA Standards for Criminal Justice, Standard 4–7.7 (2d ed. 1980) [hereinafter cited as Proposed Standard 4–7.7]. "This proposed standard was approved by the ABA Standing Committee on Association Standards for Criminal Justice but was withdrawn prior to submission of this chapter to the ABA House of Delegates. Instead, the question of what should be done in situations dealt with by the standard has been deferred until the ABA Special Commission on Evaluation of Professional Standards reports its final recommendations." Editorial Note to Proposed Standard 4–7.7.

[6] United States v. Radford, 14 M.J. 322, 325 (C.M.A. 1982).

[7] ABA Standard 7.7.

[8] 14 M.J. at 326–27.

[9] 20 M.J. 689 (A.C.M.R. 1985).

[10] *Id.* at 690–91.

[11] 744 F.2d 1323 (8th Cir. 1984), *cert. granted sub nom.* Nix v. Whiteside, 105 S. Ct. 2016 (1985).

[12] *Id.* at 1328.

[13] 14 M.J. at 325.

[14] Suppose, for example, that the accused is charged with rape and maintains that he never had sex with the victim. Suppose further that the accused has stated to counsel that, on the evening in question, he had sex with his girlfriend, who happens to be married to another man. When the laboratory reports evidence of the victim's bodily fluids and blood type from swabs taken from the accused's sexual organs and hands, defense counsel may want the accused's girlfriend to testify, if she is of the same blood type as the victim. If the accused does not wish to involve his girlfriend in the proceeding, however, he may offer to commit perjury by testifying that he had sex with a prostitute on that evening and that he cannot now locate the prostitute.

[15] ABA Standard 7.7(a).

Advise the client to testify truthfully

After determining that the client intends to commit perjury, the defense counsel's first responsibility is to persuade the client not to do so.[16] After developing an attorney-client relationship, the attorney should have created in the client a sense of trust. The defense counsel is thus in a perfect position to persuade the client not to lie. In persuading the client, the lawyer can draw upon prior experience and the experience of other counsel in speculating on the effect that the lie will have upon the fact finder. The effect will be nothing less than devastating, both on the merits and during the sentencing phase of the trial. The attorney can emphasize the unbelievability of the accused's falsehoods by identifying the contrary evidence in the case. Even if the bulk of the client's testimony would be truthful, it will not be believed or at least will be viewed with extreme caution because of the falsehoods. If the client has continually maintained innocence but wants to falsely explain evidence, assure the client that the truth should not be hidden and that justice will be done. If the client is guilty, assure the client that he or she would be better off without testifying at all, emphasizing his or her right not to do so and also emphasizing the government's burden of proof. If the government has access to adverse character witnesses on the issue of credibility, ensure that the client is aware of the prospective testimony. If the accused has any hope of an acquittal, the hope will be smashed if the fact finder believes that the accused is lying. It may be helpful to read to the client the more damaging portions of the judge's sentencing instruction on false testimony by the accused.[17] The basic point is that the client needs to be convinced that lying will do more damage to the defense case than any of the prosecution's evidence.

Counsel must be careful, however, not to go too far with the effort to convince the client not to lie. Counsel should not threaten the client, for example, by threatening to reveal the client's intent or to testify against the client. This would create an adversary relationship between counsel and client. This is the problem that caused the Court of Appeals for the Eighth Circuit to reverse a conviction as counsel's threats against the client resulted in a denial of due process and the effective assistance of counsel.[18] The court emphasized that "the Constitution prevails over rules of professional ethics, and a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics."[19]

Withdraw from the case

If the defense counsel is unsuccessful in his or her efforts to convince the client not to lie, counsel must withdraw from the case. The question is how does the counsel actually withdraw from a pending court-martial? This would have been more delicate under the 1969 Manual for Courts-Martial than it is under the current rules. Prior to 1984, defense counsel were officially detailed by the convening authority.[20] Because it would have been difficult to explain to the staff judge advocate the reasons for withdrawal, counsel could not be assured of having a new counsel appointed, especially if the request was made a short time prior to trial. Since 1984, however, detailing Army trial defense counsel is accomplished within the Trial Defense Service.[21]

1. Defense counsel must inform the client that he or she must withdraw and that the client must obtain a new attorney. Counsel must explain to the client that he or she is not ethically allowed to continue as counsel with the belief that the client will commit perjury. By explaining how the testimony will be handled in court, making it obvious that the client is lying, the client should be convinced that it would be in his or her best interest to have a new attorney. Again, counsel should not go too far by creating an adversary relationship with the client. The goal is to obtain the client's consent to release the original defense counsel from further participation in the case. Because an attorney-client relationship has been formed, the client has a right to be represented by the original counsel[22] and only the client can release the counsel. If the client will not allow counsel to withdraw, counsel must continue on the case unless excused by the military judge.

2. Arrange for the detail of a new trial defense counsel. The defense counsel should ask the detailing authority, usually the senior defense counsel, to appoint a new lawyer for the accused. The senior defense counsel should be told only that there is an irreconcilable conflict between counsel and the accused and that the accused wishes to have a new detailed attorney. If the original counsel is the senior defense counsel, he or she can easily appoint another attorney from the same field office. If counsel is the only trial defense officer at that field office, he or she can ask the regional defense counsel to detail another attorney for the accused. By arranging for the detail of another lawyer, counsel can ensure that the accused still has the right to request individual military counsel at a later time, if he or she elects to do so.

3. Assist the accused in requesting individual military counsel. If the original counsel is unsuccessful in arranging for the detail of another attorney, counsel should assist the accused in drafting a request for a specific military attorney.[23] If this request is approved, the original counsel will

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[16] *Id.*

[17] *See* Dep't of Army, Pam. No. 27–9, Military Judges' Benchbook, para. 2–60 (1 May 1982).

[18] *Whiteside*, 744 F.2d at 1328.

[19] *Id.* at 1327.

[20] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 6.

[21] Under the 1984 Manual, defense counsel are detailed in accordance with regulations of the Secretary concerned. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 503(c)(1) [hereinafter cited as R.C.M.]. AR 27–10, para. 6–9, states that the Chief, U.S. Army Trial Defense Service, will detail trial defense counsel, and that the authority may be delegated down to the senior defense counsel.

[22] *See* R.C.M. 505(d)(2)(B) and R.C.M. 506(b)(3).

[23] *See* AR 27–10, para. 5–7.

probably be excused automatically by the detailing authority. If not, counsel should still ask the accused to be released from the case.

4. Request the military judge to order release of the defense counsel. If the defense counsel is unsuccessful in getting the client to release counsel from the case, or if counsel is unsuccessful in arranging for substitute counsel, he or she should ask the military judge for an Article 39(a) session, assuming that the case has been referred to trial. At the Article 39(a) session, defense counsel should advise the military judge that he or she requests to be removed from the case. If the judge asks for a reason, counsel should go no farther than stating that there are irreconcilable differences between client and attorney, and that the attorney is required under the rules and regulations to withdraw as counsel. Under no circumstances should the military judge be told anything more, for to do so may reveal a privileged communication and may affect whether the judge will have the discretion to grant a trial by military judge alone. The military judge may ask the accused what his or her desires are, and the judge should consider those desires. If the judge grants the request to withdraw, another counsel undoubtedly would be detailed. If the judge denies the request, counsel must stay on the case.

5. Handling disputes that arise during trial. If the perjury dispute arises during the middle of the trial, counsel must still attempt to withdraw. In *Radford* the dispute arose during trial. The Court of Military Appeals held that the trial judge erred in not asking the accused if he wished to have a new counsel appointed.[24] Without explaining the procedures to be followed, the court implied that withdrawal of the original counsel would have been possible and appropriate at that point. To permit withdrawal during trial, the military judge would probably have to declare a mistrial.

6. Relationship with new counsel. The original counsel, in preserving the client's privileged communications, should not inform the new counsel of the reason for withdrawal. If the client is sufficiently sophisticated, he or she will ensure that the new counsel does not become aware that he or she will commit perjury. If the client does reveal this information, the new counsel will face the same ethical problems, and may be more successful in persuading the client not to lie. If the new counsel is not aware of the client's intent, the client may very well try to defraud the court. This approach, in effect, passes the problem from one lawyer to another, but at least the new attorney would not be aware that he or she is assisting, even passively, the client in presenting false testimony. As long as the attorneys act consistently with their ethical responsibilities, they have at least preserved their own integrity. In the end, the client is only doing a disservice to himself, and the client will probably pay for that disservice.

At trial, do not assist the client in committing perjury

If the defense counsel is required to represent the accused, counsel is absolutely prohibited from assisting the client in committing the perjury or from using the perjured testimony. Under the ABA Defense Standard,[25] and as stated by the Court of Military Appeals,[26] counsel must still advise the accused not to testify falsely, even if the bulk of the testimony would be truthful.

1. Make a private record. Counsel must make a record of the fact that the accused is taking the stand against the advice of counsel, and counsel may not reveal that fact to the court.[27] Counsel should write a memorandum for record for his or her file, and should ask the client to sign the memorandum. It may be appropriate to ask another attorney to witness the signature if that can be done without exposing the witnessing attorney to privileged communications. Alternatively, the client can be asked to voluntarily consent to the witnessing attorney's participation.

2. Handling the testimony during trial. When the client takes the stand to testify perjuriously, counsel must confine the direct examination to identifying the witness as the accused, if the trial counsel has not done so, and asking the accused if he or she wishes to make a statement to the court about the offense. The defense counsel must not conduct any conventional direct examination regarding the perjured portions of the testimony. Conventional direct examination is appropriate concerning matters to which the answers will be truthful.[28] The trial counsel will then cross-examine the accused, either exposing the perjury or further developing the accused's lies. The defense counsel may not try to convince the court to believe the false testimony, and may not recite or rely upon that testimony in closing argument.[29] If the accused testified truthfully as to some matters, counsel can try to convince the court that those aspects of the testimony are true.

3. Handling the rest of the case. It should be noted that, except as prohibited by the rules, the defense counsel is free to present a vigorous defense for the accused, and, of course, should do that as if the perjury had not occurred. Thus, counsel may continue to cross-examine and impeach government witnesses, present defense witnesses and evidence, and argue that the accused is not guilty or that the government has not proven the accused's guilt beyond a reasonable doubt. But under no circumstances may counsel use or rely upon the known false testimony.

Future Changes to the Rules

It is entirely possible that the law concerning client perjury will change in the future, as it has in the past. These changes could occur as a result of changes in the standards applied to Army counsel by regulation or by the courts. The purpose of discussing these possible changes is not to suggest guidelines for handling client perjury under new rules, but simply to alert defense counsel that they should

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[24] 14 M.J. at 327.

[25] ABA Standard 7.7.

[26] *United States v. Radford.*

[27] ABA Standard 7.7(c).

[28] *Id.*

[29] *Id.*

watch for future changes. Two of these possible changes will be discussed here.

If Army regulations ever apply the ABA's new Model Rules of Professional Conduct to judge advocates, the approach to client perjury may change. Consistent with the existing rules, the Model Rules prohibit a lawyer from offering "evidence that the lawyer knows to be false."[30] In addition, the Model Rules state that a "lawyer may refuse to offer evidence that the lawyer reasonably believes is false."[31] If the lawyer learns of the perjury after the fact, the new Model Rules require the lawyer to "take reasonable remedial measures."[32] This requirement would apply "even if compliance requires disclosure of information otherwise protected" by the rules governing privileged communications.[33] The comment to the model rules acknowledges, however, that "the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases."[34] It is the constitutional aspect of the problem that has been troublesome to the appellate courts, and, as indicated earlier, the U.S. Supreme Court is currently reviewing a case from this viewpoint.

Another possible change would clarify the procedures for direct examination of the client to make it clear that counsel may ask questions when he or she believes the accused's answers will not be perjurious.[35] This approach would make it less obvious that the defense counsel does not believe the accused, and would allow counsel to conduct a beneficial direct examination concerning the matters to which the answers will be truthful.

Conclusion

The rules governing client perjury are a compromise between two competing principles: honesty toward the court; and preserving client confidences and secrets. When the defense counsel faces this problem, he or she must be very careful not to violate the rules of ethics. Although the attorney must ensure that the client receives a fair trial, the attorney must not forget his or her personal integrity. The methodology suggested in this article is admittedly a self-serving concept to protect the attorney's career. But no attorney should sacrifice his or her future by assisting a client in committing a fraud upon the court.

[30] ABA Model Rules of Professional Conduct Rule 3.3(a)(4) [hereinafter cited as Model Rules].

[31] Model Rules 3.3(c).

[32] Model Rules 3.3(a)(4).

[33] Model Rules 3.3(b).

[34] Model Rules 3.3 comment.

[35] Proposed Standard 4-7.7(c).

Contract Appeals Note

Contract Appeals Division

The Limitation of Funds Clause: Keeping the Lid on Pandora's Box

In 1966, the Limitation of Funds (LOF) clause, used in cost type contracts, was revised to provide, *inter alia,* that only a formal written notice from the contracting officer increasing the contract's estimated cost would constitute approval of additional funding. Until recently, the boards of contract appeals and the courts have given full force to this express mandate of the statute. The Armed Services Board of Contract Appeals (ASBCA) reached a similar result in the case of *American Electronic Laboratories, Inc.,* ASBCA No. 26042, 84–2 BCA (C.C.H.) para. 17,468. The contractor argued that the government induced it to continue performance and that the government should be estopped from relying on the LOF clause. The ASBCA rejected the contractor's argument.

Unfortunately, the Court of Appeals for the Federal Circuit reversed the board's decision in *American Electronic Laboratories, Inc. v. United States,* 774 F.2d 1110 (Fed. Cir. 1985), *petition for reh'g denied* (Dec. 5, 1985). While the court found that the contractor had not provided timely notice of the overrun, it found that the contracting officer had decided to fund the overrun. This decision was not, however, communicated to the contractor. The contractor contended the government's conduct barred or estopped it from denying that the contracting officer agreed to fund the overrun. In evaluating the validity of this estoppel argument, the court stated:

> Four elements must be present to establish an estoppel: (1) the party to be estopped must know the facts, *i.e.,* the government must know of the overrun; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, *i.e.,* that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment.

Id. at 1113 (citations omitted).

There was no contest on elements (1) and (3). The court found in favor of the contractor on elements (2) and (4). It held that the ASBCA's implied finding that the contractor did not reasonably rely on the government's conduct was not supported by substantial evidence. The court concluded that the government was estopped from relying on the LOF clause in the sum of $900,000, the amount of money which the government had told the contractor would be available. *See also* 27 Gov't Contractor, para 301 (Oct. 28, 1985).

It would be wise for contracting officers to avoid taking actions similar to what occurred in the *AEL* case. Once the government is placed on notice of an overrun, it should do nothing which could be construed as action inducing the contractor to continue to perform. The wisest course of action appears to be affirmatively warn the contractor in writing not to continue performance unless and until additional funding is formally added to the contract. Also, all government personnel should be thoroughly instructed on the status, and they should not imply to the contractor anything different than what is contained in the written warning. If the contractor continues performing thereafter, it does so at its own risk. Most likely, such a warning will bring performance under the contract to a halt. While this may be difficult as a practical matter, especially in high priority projects, it will force prompt agreement between the government and the contractor, or lead to a decision to abandon further effort on the contract.

Patents, Copyrights, and Trademarks Note

Recent Developments in Government Patent and Data Policy

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The following is the text of an address presented on 15 January 1986 to the Contract Law Symposium, held at The Judge Advocate General's School.

An appropriate place to start this discussion is with Public Law 96–517, which is entitled the "Patent and Trademark Amendments of 1980." This law amended Title 35 of the U.S. Code relating to patents. One of the features of this law was to establish a uniform patent policy whereby universities and small business would have rights in their inventions made under government contract.

This was significant in a number of respects. It was the first government-wide patent policy set forth in statute. Prior to that time, the only laws relating to patent rights were limited to a specific agency such as NASA and the Department of Energy (DOE). In addition, those agencies were required to take title to contract inventions. The shift from a "title" to a "license" policy resulted from Congress becoming less concerned over the last thirty years about the possibility that taxpayers may pay twice for government-funded inventions than over the United States falling behind Germany and Japan in technology and productivity. The new policy was limited to universities and small businesses because as a class they were considered to be highly

innovative. There was also a general reluctance in Congress to give the same treatment to big business which receive more than ninety percent of the government research and development (R&D) funding and make most of the inventions.

President Reagan, however, did not see any reason to treat big business differently and ordered government agencies on February 18, 1983, to adopt the patent policy in Public Law 96–517 for all their contractors. This, in effect, cancelled the Presidential Statement of Government Patent Policy issued by President Kennedy in 1963 and revised by President Nixon in 1971. These earlier policy statements allowed for different patent rights depending on whether the contract was to produce technology for the general public or for the government. Thus, prior to 1983, the Department of Health and Human Services was allowed to take title to its inventions, in contrast to the Department of Defense which acquired only a royalty-free license.

The enactment of Public Law 96–517 and the issuance of President Reagan's policy did not resolve all matters because details of implementation needed to be provided by regulation. As these regulations were being drafted, a project was started to combine the Federal Procurement Regulation with the Defense Acquisition Regulation to have a single Federal Acquisition Regulation (FAR). The Office of Management and Budget (OMB) issued the Public Law 96–517 regulations separately from the procurement regulations because that law gave the regulation authority to the Office of Federal Procurement Policy in OMB. Initial guidance was issued in OMB Bulletin 81–22 on July 2, 1981, and then in OMB Circular A–124 on February 19, 1982, which was revised on March 20, 1984. This guidance was subsequently adopted by the agencies in their respective procurement regulations. Public Law 96–517 and President Reagan's statement appear now in Part 27, Subpart 27.3 of the FAR.

In 1984, Congress made some minor changes to the 1980 patent policy. Public Law 98–620 eliminated some of the licensing restrictions on universities and adopted the invention reporting requirements from OMB Circular A–124. To date, Part 27 of the FAR has not been changed to implement Public Law 98–620. The Department of Commerce, which was assigned the authority to issue regulations under the new law, drafted a revision to OMB Circular A–124 and the agencies have submitted their comments. A final version is expected imminently.

But what is the effect of this legislation on DOD and its contractors? Since DOD's general policy was to allow its contractors to have patent rights, this did not require a major change in patent policy for DOD and its contractors. The only exception to this was in medical research contracts which previously contained a "title" patent rights clause.

However, there were some procedural changes. For example, the "deferred determination" patent rights clause disappeared from the regulations because it was used primarily for universities which did not have an established licensing program and for small businesses not having a commercial position in the technology relating to the contract. In addition, the circumstances are now very limited under which agencies are permitted to use a "title" clause, and then only with the approval of the agency head. As a result, there is no longer a need for contractors to request greater rights in their inventions.

The regulations still allow for a different and more comprehensive clause to be used for big businesses. This was fought for by DOD, DOE, and NASA, which felt that the relaxed provisions for universities and small businesses were not appropriate for large businesses, which have adequate resources to process inventions more promptly, thereby better preserving the government's rights. Unlike big businesses, which are required to file a patent application within one year of making the invention, universities and small businesses are given more than two years. As a result, agencies do not have much opportunity to file applications on university and small business inventions.

The interest of Congress in data rights under government contracts is a relatively recent phenomenon. In 1982, Congress continued to recognize the important role that small business plays in high technology by requiring in Public Law 97–219 a 1.25 percent set aside for small business in agencies having an R&D budget in exess of $100 million. The law also provided for the retention of data rights by contractors in the Small Business Innovation Research (SBIR) Program. The Small Business Administration issued guidance in its Policy Directive No. 65–01 on November 19, 1982, which indicated that data under the SBIR program would be protected until two years after the project was over at which time the government would have royalty-free use of the data.

This policy was unique in several ways. It was the first government-wide data policy set forth in statute. Prior to that time, the policy existed in the form of various agency procurement regulations which were allowed to vary because of the absence of a data section in the Federal Procurement Regulations. Although this resulted in a lack of uniformity, there was a general agreement among the agencies that data created under the contract either belonged to the government or the government had unlimited rights of use. This, of course, was changed by Public Law 97–219 for data under the Small Business Innovation Research Program.

The lack of uniformity in government data policy has been recognized as a problem for a number of years. Both the President's Commission on Government Procurement in 1972 and the House Committee on Government Operations in 1978 (House Report No. 95–1663), recommended that standard data rights clauses be developed. In 1979, GSA chaired an interagency group which started to draft some regulations and this effort continued under the FAR Project. Part 27.4 of the FAR was prepared but was not issued because of disagreement over its provisions. Instead, two separate policies were published, one for the civilian agencies and the other for DOD in recognition of the agencies' different uses of data. DOD chose to adopt its existing policy from the Defense Acquisition Regulation. This policy, which is now contained in the DOD FAR Supplement (DFARS), may be described as a "license" whereby the government's rights of use are unlimited unless the data relates to items or components developed at private expense.

An independent effort was undertaken by the Department of Commerce in its role as Chairman of the Intellectual Property Committee to the Federal Coordinating Council for Science, Engineering and Technology to develop a government-wide data policy. In March 1985, the

Chairman of the Federal Council rejected Commerce's proposed policy as being too "pro-contractor." This initiative probably died when the Chairman of the Council deactivated the Intellectual Property Committee in November 1985.

When the high cost of spare parts procured by DOD became a matter of concern for Congress, the interest in the government obtaining adequate data rights started to grow. In August 1983, the Secretary of Defense authorized the military services to negotiate special data clauses in order to reduce procurement costs. The Air Force used this as the basis for its clause limiting the protection of all "limited rights" data to 60 months. The Navy required its contractors to give the government a priced option to purchase unlimited rights. There was no Army-wide policy.

These special clauses and procedures generated a great amount of controversy. In fact, both the Navy and the Air Force made several changes as a result of the negative comments from industry. Nevertheless, the services did claim substantial savings as a result of their spare parts initiatives. For example, under the Navy's "buy our spares smart" or BOSS program, competition went from 30.5 percent in FY 83 to 36.9 percent in FY 84. The program cost $35 million, but resulted in saving an estimated $193 million. The Air Force estimated its savings to be about $500 million . In the Army Materiel Command (AMC), competition in spare parts increased from 47 percent to 50.9 percent.

The Office of the Secretary of Defense (OSD) made a separate review of data rights in 1984, and surprisingly concluded that lack of data rights was not a major contributing factor to the high cost of spare parts. This was based on the fact that of the spares surveyed that were not competed, four percent was due to lack of data rights compared to twenty-seven percent because of insufficient, inaccurate, or illegible data.

Congressional interest in data rights resulted in the passage of Public Laws 98–525 and 98–577 in the 1985. Public Law 98–525 was the 1985 DOD Authorization Act and contained data policy in the section entitled the "Defense Procurement Reform Act of 1984." Public Law 98–577, the "Small Business and Federal Competition Enhancement Act of 1984" provided a data policy for the civilian agencies.

Both laws focused on the obtaining of competition in government procurement to reduce costs, especially with respect to spare parts. The problems in spare parts had been well publicized by the press to such an extent that the general public probably remembers the $436 claw hammer, the $9,000 Allen wrench, or the $7,622 coffee maker. It is of interest that Congress in passing these laws recognized that data rights was not a major cause for the high prices as members originally had thought. Instead, it identified the lack of emphasis of management in the agencies on obtaining competition and the inability of the agencies to retrieve data as being more significant. Nevertheless, Congress felt that data rights were necessary to reduce procurement costs and therefore provided some guidance and requirements for the agencies.

Much of the policy guidance in Public Law 98–525 is general and allows DOD the flexibility of addressing the specifics in its regulations. The law has two provisions on data rights to be added to Title 10 of the U.S. Code: Section 2320 "Rights in Technical Data" and Section 2321 "Validation of Proprietary Data Restrictions." Many of the requirements in Section 2320 already appear in the DFARS. One somewhat different concept, however, was introduced whereby DOD was encouraged to limit the period for restrictions on some data not to exceed seven years. This policy, which was almost mandated by Congress to cover *all* data, suggests approval of the Air Force initiative to limit restrictions to five years. The intent of Congress was that the government should be able to buy replenishment parts at fair and reasonable prices during the lifetime of its major systems.

The "validation" section in contrast to the one on "rights" contains a great amount of detail which reflects the concern of Congress over improper marking of data by contractors. The law places the burden of proving the right to restrict use of data on the contractor and establishes contractor liability for costs of challenging the legend if the contractor unjustifiably mismarks data. This liability was in lieu of the "liquidated damages" provision which was dropped by the Conference Committee. In turn, the government may also be liable for the contractor's costs if the challenge by the government is found not to be made in "good faith."

The validation procedure seems much more complicated than the present one in the DFARS and includes the additional step of a pre-challenge review by the government based on "reasonable grounds." Under the old system, DOD could issue a "60-day" challenge letter and if there was no response or if the response was considered inadequate, the legend could be removed. In the latter situation, however, many contracting officers were reluctant to remove the legend without going through the disputes procedure and generally issued a Final Decision letter.

An interim regulation implementing Public Law 98–525 was published on October 24, 1985 effective as of October 18, 1985. It did not include some of the controversial provisions from the proposed regulation of September 10, 1985. For example, the definition of "developed at private expense" was deleted and the certification of the accuracy of the data was lessened "to the best of the contractor's knowledge and belief." This regulation included the "validation" procedures from the FAR, which were published for comment on October 3, 1985. As stated therein, the interim regulation was a modification of existing DFARS coverage to incorporate the specific requirements of PL 98–525 and PL 98–577 and was not intended to generate comments. Whether industry agrees with this assessment will be seen when the comments, due by January 9, 1986, are reviewed.

A few words about the definition of "developed at private expense." Under the standard DOD data rights clause, the government has only limited rights which does not include the right to use the data for competitive procurement if the data relates to items developed at private expense. Thus, the meaning of "developed at private expense" becomes very important in the determination of the government's rights. Interestingly enough, there is very little case law on the meaning of the phrase and only recently did the ASBCA attempt to provide a definition in Bell Helicopter Textron, ASBCA No. 21192 (September 1985).

In that case involving the TOW missile launcher built by subcontractor Hughes Aircraft Company for the Cobra

Helicopter, Judge Lane concluded that for there to be development, an item or component must be in being, which in nearly every case means that a prototype must have been fabricated. In addition, the item or component must be analyzed and/or tested sufficiently to demonstrate that there is high probability that it will work as intended. The only exception to this might be if the item or component was so simple that its workability could be so obvious from its design that fabrication of a prototype would be unnecessary to demonstrate its workability. Thus, the degree and type of testing depends on the nature of the item and state of the art. All development does not have to have occurred as might be required to sell the item or component. The board found that development is quite close but not necessarily identical to the patent law concept of "actual reduction to practice." "Private expense" was interpreted to be 100% non-government funds except there might be a situation where the government support may be disregarded if "de minimus." An appeal of the Board's decision to the Court of Appeals for the Federal Circuit was filed by the contractor on January 15, 1986.

The interest in defining the term is not new and one was proposed by the Armed Services Procurement Regulation ASPR Committee back in 1972 (the committee was the predecessor of the Defence Acquisition Regulation Council). Industry objected and there was disagreement among the services. The committee did not adopt the definition but gave no reasons for its action. In addition, the House version of the 1985 DOD Authorization Act (H.R. 5064) included a definition. This, however, was dropped when the bill went to conference.

Although the law is silent on this matter, it does require in section 2320 that "the legitimate proprietary interest of the Government and the contractor be defined in regulations." Thus, I think that it is appropriate to include a definition of "developed at private expense." AMC presently favors a definition as so did the OSD Technical Data Rights Study Group. It should assist in clarifying the rights of the parties and not, as previously expressed by the Navy in its objection to the 1972 definition, complicate the situation by adding different standards.

But where is this all heading? In government patent policy, things seem to be stabilizing. Senate Bill 64 was introduced in January 1985 to enact President Reagan's 1983 patent statement. The purpose was to cover those agencies such as DOE and NASA which are required by their statutes to take title to inventions made by large businesses. Hearings have yet to be scheduled and there does not seem to be much of a push because both DOE and NASA have a liberal waiver policy. As far as regulations go, Part 27.3 of the FAR will be revised shortly to adopt the revised OMB Circular A–124 once that becomes finalized.

Data, however, is an entirely different subject and this area should be very active over the next several years. The first item for DOD is to develop the final coverage in the DFARS. Next, as required by statute, the effort to have single FAR coverage on data will be started again. Thus, the procedures and policies which can and should be uniform will appear in the FAR. The supplements to the FAR will include implementation which is unique to the agencies.

With legislation, it is generally difficult to predict what bills will be introduced. However, the interest in Congress is still very high in improving the procurement process and so I would not be surprised if we see more bills this session. Senator Dan Quayle (R-Ind), Chairman of the Senate Subcommittee on Defense Acquisition Policy, recently indicated that he intends to propose legislation establishing a 10,000 member professional civilian acquisition corps.

One final note, there is legislative activity in a related area. On December 9, 1985, the House unanimously passed H.R. 3773, which established a patent policy for government-owned laboratories. It would allow the laboratories to enter into cooperative research and license agreements with industry in order to more effectively transfer its technology to the private sector. The laboratories would keep a portion of the royalty income and the inventors rewarded through an expanded incentive awards system. Senate Bill 1914 was introduced on the same day in the Senate with very similar language except that inventors would receive fifteen percent of the royalties. The Administration has some concerns about these bills, but I think that they can be taken care of without requiring major changes in the bills. Chances for passage for these bills look promising. Public Law 98–620 was enacted in 1984, and established a similar policy for government-owned, contractor-operated laboratories.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Contract Law Note

Government Acquisition Changes: 1986 DOD Authorization Act

The 1986 DOD Authorization Act, Public Law 99–145, was enacted on 8 November 1985 and appears at 99 Stat. 689. As usual, in addition to authorizing DOD programs and operations, this statute contains provisions which impact in various other ways on the contracting process. Certain of the Act's provisions affecting contracting are noted here.

Strategy to Ensure Alternative Sources

As further evidence of congressional interest in expanding competition, the 1986 DOD Authorization Act adds section 2305a to Title 10 that requires the Secretary of Defense to prepare and submit to Congress an acquisition strategy prior to beginning full-scale development under a major program. The strategy must ensure that competitive alternative sources will be available for a system (and each major subsystem) throughout the life of that system, from the beginning of full-scale development through the end of production. The requirement is met even if the alternative sources develop or produce systems that are not identical, as long as the systems serve similar functions and compete effectively with each other. Preparation of the acquisition strategy may be waived only when prescribed conditions exist and Congress is notified.

Management of Spare Parts Acquisition

Responding to a General Accounting Office report on overpriced spare parts, Congress identified DOD management problems which have in some instances contributed to the acquisition of spares at unreasonably high prices. Practices which Congress believes increase prices include building to overly detailed specifications, requiring excessive engineering and manufacturing steps, purchasing in uneconomic quantities, allowing excessive corporate overhead and profit, acquiring items noncompetitively, and purchasing from other than manufacturers. Section 914 of the 1986 DOD Authorization Act requires the Secretary to report on and evaluate steps taken to overcome these management problems.

Cost Controls

Several sections of the DOD Authorization Act reflect congressional interest in DOD's use of cost controls for major contracts. These include:

1. A requirement that the Secretary of Defense report annually on DOD's planned use of should cost analysis for major defense acquisition programs (§ 915);

2. A limitation on progress payments to the amount of work actually accomplished. In the case of undefinitized contracts, progress payments are further limited to eighty percent of the work actually accomplished (§ 916);

3. The addition of section 2406 to Title 10, imposing strict cost and price management requirements for major manufactured end items applicable to contracts to which the Truth in Negotiations Act (10 U.S.C. § 2306(f)) applies. Contractors will be required to submit bills of labor and material that reflect the contractor's computation of costs of labor and material for the manufacture of parts and subassemblies for end items as well as the costs of routine testing of such parts and subassemblies (§ 917); and,

4. A requirement to account for and identify in budget requests the costs of contracted advisory and assistance services (§ 918).

Settlement of Indirect Costs

Section 911 of the Authorization Act adds § 2324, "Allowable Costs Under Defense Contracts," to Title 10. The new provision defines the following indirect costs as not allowable on contracts (other than fixed-price without incentives) over $100,000:

entertainment costs;
lobbying costs;
costs of defending civil or criminal fraud proceedings brought by the United States where the contractor is found liable or pleads *nolo contendere;*
fines and penalties for violation of laws or regulations;
costs of membership in "social" organizations;
costs of alcoholic beverages;
contributions or donations, regardless of recipient;

costs of promotional advertising and items of memorabilia; and
air travel costs exceeding standard commercial air fare.

Contractors will be required to certify (unless waived by the Secretary) that, to the best of the certifying official's knowledge and belief, all claimed indirect costs are allowable. If the Secretary determines by clear and convincing evidence that a claimed indirect cost is unallowable, the Secretary shall disallow the cost and assess a penalty equal to the amount of the disallowed cost plus interest on overpayments. Furthermore, if claimed costs with respect to a particular contractor have already been determined to be unallowable, but the contractor nevertheless submits a proposal for such costs, an additional penalty equal to two times the amount of such costs shall be assessed. The Secretary may also assess a penalty of not more than $10,000 per proposal determined to be unallowable. The contractor remains subject to additional penalties for violations of the False Claims Acts (18 U.S.C. § 287 and 31 U.S.C. § 3729).

The Secretary is required to amend the Defense Federal Acquisition Regulation Supplement to "define in detail and specific terms" the costs which are unallowable in designated areas.

Section 933 of the Authorization Act provides that the burden of proving the reasonableness of indirect costs for which a contractor seeks reimbursement before the Armed Services Board of Contract Appeals, the U.S. Claims Court, or a federal court, shall be on the contractor. Prior to passage of the Act, the burden had been upon the government to prove that a cost was unreasonable.

Cost and Pricing Data

Section 934 of the Act establishes interest and penalty provisions for overpayments resulting from the submission of inaccurate, incomplete, or noncurrent cost or pricing data under the Truth in Negotiations Act. In addition to repayment of the amount of overpayment, contractors will also be assessed interest from the date of payment by the government to the date of repayment by the contractor. If such a submission was knowing, the contractor will be assessed an additional penalty equal to the amount of the overpayment.

Subpoena Power

The 1986 DOD Authorization Act includes a provision granting the Defense Contract Audit Agency (DCAA) the power to subpoena records it would have access to under 10 U.S.C. § 2313(a) (allowing inspection of records of contractors performing cost-type contracts with the military departments and NASA) and the Truth in Negotiation Act. On 11 December 1985, DCAA issued a new regulation (DCAA Regulation 5500.5) that governs the process by which defense contractors' records will be subpoenaed.

Conflicts of Interest/The "Revolving Door"

The Authorization Act imposes new conflicts of interest standards on procurement personnel.

1. Section 921 imposes a criminal sanction (1 year/$5,000) on a presidential appointee who, after acting as a primary government representative in a contract negotiation or settlement with a defense contractor, accepts employment with that contractor within two years after concluding such activities. Contractors may forfeit up to $50,000 in liquidated damages as well.

2. Section 922 amends 10 U.S.C. § 2397 to impose improved reporting and disclosure requirements on former employees of DOD employed by, or serving as a consultant to, a defense contractor within two years after leaving DOD.

3. Section 923 creates a new § 2397a to Title 10 which requires a defense official performing "procurement functions" to report contacts with defense contractors relating to future employment during a period when the official performed a procurement function resulting in an award to the contractor. For any period following the contact during which future employment has not been rejected, the official must disqualify him or herself from performing any procurement function relating to the contracts of that defense contractor. Failure to report or disqualify as required may result in a bar to employment with that contractor for up to ten years and an administrative penalty of up to $10,000.

4. Section 925 requires the Secretary of Defense to develop a policy of regular rotation of principal contracting officers and report to Congress on the policy.

Statutory Controls on the Commercial Activities Program

Section 1232 of the Authorization Act extends for one year (until 1 October 1986) the prohibition on contracting out the performance of firefighting and security functions which originally appeared in the 1984 DOD Authorization Act (Pub. L. No. 98–94, 97 Stat. 691).

Section 1233 directs contracting out of services when it has been determined to be more cost effective and in the best interests of national security. This is the first congressional mandate requiring contracting out of DOD commercial activities.

Section 1234 raises the thresholds applicable to the contracting out procedures established in the 1981 DOD Authorization Act (Pub. L. No. 96–342, 94 Stat. 1086). Under the 1986 Act, reporting requirements apply only when more than forty DOD civilians are involved, and the portion of the report pertaining to the potential economic effect on the affected employees and the local community is now required only when more than seventy-five employees are affected. The thresholds established by the 1981 Act were ten and fifty, respectively.

Miscellaneous Provisions

Flextime. Section 1241 of the Authorization Act amends both the Contract Work Hours and Safety Standards Act and the Walsh-Healey Act to allow for flextime schedules for federal contractor employees by deleting the requirement to pay overtime for work in excess of eight hours per day. Now overtime will be required only for work in excess of forty hours per week.

False Claims. Section 931 of the Act amends 18 U.S.C. §§ 287 and 2623 to allow a maximum criminal fine of $1,000,000 for false claims relating to DOD contracts, and amends 31 U.S.C. § 3729 to allow a civil penalty of $2,000 and three times the amount of damages to the government for false claims on DOD contracts.

Multiyear Contracts. Section 101 of the Act places a limitation upon approved multiyear contracts. No multiyear contract may be awarded unless the total anticipated cost over the period of the multiyear contract is no more than ninety percent of the total anticipated costs of carrying out the same program through annual contracts.

Investment Items Purchased with OMA Funds. Section 303 of the Act raises the dollar limit from $3,000 to $5,000 on the use of Operation & Maintenance, Army (OMA) funds to purchase investment items.

Fraud or Felony Convictions. Section 932 of the Act prohibits any person convicted of fraud or any other felony arising out of a DOD contract from working in a management or supervisory capacity on any defense contract for a period of not less than one year. Lieutenant Colonel Graves, Major Kennerly, and Major Post.

Criminal Law Note

Appellate Courts Address Speedy Trial Issues

The Court of Military Appeals and the Army Court of Military Review recently addressed important speedy trial issues in two cases. In both cases, charges were dismissed for speedy trial violations.

In *United States v. Burris,*[1] the primary focus of the Court of Military Appeals was the proper scope of review of appellate courts on a government appeal. The rulings of the trial judge are also instructive. A total of 136 days elapsed in the case from initial restraint to trial.[2] Violation of the 120 day rule of R.C.M. 707 was raised by the trial defense counsel. The government responded that certain docketing delays were excluded from government accountability under R.C.M. 707(c)(3) as delay "at the request or with the consent of the defense."[3]

On 21 February 1985, the trial counsel notified the defense on a "Docket Notification" form that the government would "be ready to proceed on or after: 22 Feb 85."[4] The defense responded on 22 February by lining out the language on the form indicating "delay until" and requesting "a projected trial date of 25 March 85," the 131st day from initial restraint.[5] At trial, the defense counsel represented that he was not requesting a delay but, after checking with the court clerk, requested "the first available trial date that was reasonable."[6] The clerk docketed the case for 25 March, finding it "unfeasible to docket the case any sooner."[7] The trial judge later moved the case on the docket to 8 April to accommodate another trial.[8]

A docket conference was held on 19 March at which the trial counsel apparently expressed concern about speedy trial.[9] At the conference, the defense counsel stated he had previously notified his witnesses of the 25 March trial date and the 8 April date. The judge proposed 26 or 28 March as possible trial dates. The next day, 20 March, the defense counsel informed the judge that his witnesses would not be available on 26 or 28 March. The case was set for trial, and tried by another judge, on 1 April.[10]

In reviewing the period 22 February to 25 March for possible defense delay, the trial judge reasoned the defense had *not* requested delay, and had put the government on notice by lining out "delay" on the docket notification form.[11] In requesting a "projected trial date," the defense was "setting forth a negotiating position."[12] It was the government that set the trial date for 25 March.[13] The trial judge also found the defense was not responsible for the delay from 25 March to 1 April. The judge reasoned the defense did not request delay past 25 March, and did not decline to go to trial on 25, 26, or 28 March.[14]

The Army Court of Military Review reversed the trial judge in a per curiam opinion,[15] finding "nothing in the record" to support the trial judge, and that the judge "abused his discretion"[16] in not excluding the periods 22 February to 25 March and 25 March to 1 April as delay "at the request or with the consent of the defense."

The Court of Military Appeals reversed the Army court, finding that the court of review "reinterpreted the facts and substituted its judgment for that of the trial judge."[17] The Court of Military Appeals stated that, in reviewing matters of law on a government appeal,

> the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are "fairly supported by the record" . . . . "[T]o give due deference to the trial bench," a determination of fact "should not be disturbed unless

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[1] 21 M.J. 140 (C.M.A. 1985).
[2] *Id.* at 141.
[3] *Id.* at 142.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 142–43.
[9] *Id.* at 143.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] 20 M.J. 707 (A.C.M.R. 1985).
[16] *Id.* at 709.
[17] 21 M.J. at 144.

it is unsupported by the evidence of record or was clearly erroneous."[18]

The court found that the government at trial "failed to establish a proper record, and it is not for appellate courts to launch a rescue mission."[19] To avoid these problems in the future, the court suggested that, after referral, trial judges act on all requests for delay to "establish as a matter of record who requested what delay and for what reason."[20] In a DA message following *Burris*, staff judge advocates and trial counsel were reminded to ensure cases are docketed for trial within the required speedy trial period.[21]

Charges were also dismissed for lack of speedy trial in *United States v. Durr*.[22] The Army Court of Review decision in *Durr* is the first appellate court application of the 90 day rule of R.C.M. 707(d). In *Durr*, the accused was restricted on 7 November 1984 as an Article 15 punishment.[23] On 9 November, Durr committed acts that later led to charges of larceny, assault, and breaking restriction. On 12 November, the terms of Durr's restriction were increased based on his acts of 9 November. The trial judge found this restriction was "tantamount to confinement" and marked the inception of pretrial confinement for speedy trial purposes.[24] In December, the accused committed additional offenses, and on 27 December charges for all offenses were preferred and he was put in pretrial confinement. Trial was not held until 2 April 1985.[25]

At trial, the judge determined that the accused was in pretrial confinement or under restraint tantamount to confinement for 141 days. Of these 141 days, the defense was responsible for 27 days, leaving the government accountable for 114 days. Thus, the government did not violate the 120 day rule of R.C.M. 707.[26] The trial judge also considered the *Burton*[27] 90 day rule and found the government "proceeded diligently in a 'complex and convoluted' case."[28]

On appeal, the Army Court of Review noted that the trial judge had not applied R.C.M. 707(d).[29] R.C.M. 707(d) states that an accused "shall not be held in pretrial arrest or confinement in excess of 90 days." Accepting the trial judge's calculation, the Court of Review found that Durr had been held in "arrest or confinement" for 114 days, 24 days beyond the 90 day limit of R.C.M. 707(d).[30]

The court then considered whether R.C.M. 707(c)(8), which excludes periods of delay "for good cause," might reduce the government's accountable time.[31] The court considered that "good cause" was something less than "extraordinary circumstances"[32] and required an "event . . . of the type that may justify a delay" and a "nexus" between "the event and any delay in trial."[33] First, the court addressed whether the commission of additional offenses might justify a delay. The court concluded that, while additional offenses may justify a delay, they were not per se justification, and nothing in the record showed the additional offenses had delayed the prosecution.[34] Also, the court considered whether the complexity of the case might be "good cause" for delay. Again the court found against the government, finding the case not to be complex.[35] Because only the early offenses of the accused which were the initial basis for restraint were beyond the speedy trial period, the court dismissed those charges and reassessed the sentence on the remaining charge.[36] Major Wittmayer.

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[18] *Id.* (citations omitted).

[19] *Id.* at 145.

[20] *Id.*

[21] DAJA–CL 15 Dec 85, subject: Speedy Trial and Case Docketing. Trial Judiciary Memorandums 86–1, 16 Jan 1986, and 86–2, 22 Jan 1986, also followed from *Burris*. TJ memo 86–1 stresses the importance of fact finding by trial judges, and TJ memo 86–2 emphasizes the need for judges to establish effective docketing procedures, to control their dockets, and to establish clear responsibility for delays.

[22] 21 M.J. 576 (A.C.M.R. 1985).

[23] *Id.* at 577.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[28] 21 M.J. at 577.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 578.

[32] The court noted that R.C.M. 707(d) required "extraordinary circumstances" to extend the permissible period of pretrial arrest or confinement from 90 to 100 days. 21 M.J. at 577, 578. Because the exclusions of R.C.M. 707(c), including the "catch all" exclusion for "good cause," are also excluded from this 90 day period (except the exclusion for joint trials, (c)(7)), query how an "extraordinary circumstance" to extend the 90 days would not also be an exclusion?

The court did not discuss *United States v. Kuelker*, 20 M.J. 715 (N.M.C.M.R. 1985) (per curiam) (R.C.M. 707(c)(8) "good cause" requires "an extraordinary situation").

[33] 21 M.J. at 578.

[34] *Id.*

[35] *Id.* at 579.

[36] *Id.* R.C.M. 707(d) contemplates a procedure where an accused in pretrial arrest or confinement will be released after 90 days, minus any exclusion, if not tried before that time, thus avoiding the remedy of dismissal (unless the *Burton* 90 day rule is applied and an exclusion permitted under R.C.M. 707(c) is rejected as not permitted under *Burton*). The rule does not, however, specify a mechanism to make the rule work. One view would be to apply waiver against the defense if they do not seek release. Another view would put the burden on the government to try or release an accused within 90 days, or to get the trial judge to rule within the 90 day period on possible exclusions, or suffer dismissal.

Professional Responsibility

Arkansas Adopts Model Rules of Professional Conduct

On December 16, 1985, the Arkansas Supreme Court adopted a version of the Model Rules of Professional Conduct, bringing the number of states which have adopted the Model Rules to nine. The rules adopted by Arkansas are substantially similar to the American Bar Association's Model Rules of Professional Conduct. The primary difference concerns the area of confidentiality, and specifically the rule concerning communications about future crimes. The ABA's rules grant the attorney discretion to reveal confidences by a client of intent to commit a crime only when the crime is one which is likely to result in imminent death or substantial bodily harm. The Arkansas rules will permit the attorney to disclose a client's communications of intent to commit any crime when necessary to prevent the crime.

Multistate Practice and Choice of Laws

Legal assistance officers are frequently practicing law in states other than their state of licensing. This raises the issue of what code of ethics they should follow. AR 27–1 and AR 27–3 both make the Model Code of Professional Responsibility binding upon the Army lawyer. This, however, does not answer whether the military attorney's state of licensing might also require the military attorney to follow its code of ethics, though not practicing in the state. States that have adopted the Model Rules of Professional Conduct will address this question in terms of Rule 8.5 which states: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The comments following Rule 8.5 indicate that when a lawyer is licensed in two jurisdictions that impose conflicting obligations, applicable rules of choice of law will govern the situation.

A recent Maryland opinion illustrates how one jurisdiction interprets that rule. A Maryland attorney, who was also admitted to practice in the District of Columbia, was representing a client in court in the District of Columbia. The attorney learned that his client had provided forged material which had been introduced into evidence before the court. Under the Maryland rules, the attorney had a duty both to call upon his client to rectify the fraud, and if his client refused, to reveal the fraud to the tribunal. The ethical rule for the District of Columbia, however, required the attorney to call upon his client to rectify the fraud, but did not require the attorney to reveal the fraud to the court if the client refused or was unable to do so. The Maryland State Bar Association Committee on Ethics expressed the following opinion concerning whether an attorney would be unethical for following the foreign jurisdiction's less stringent rule:

> Where a Maryland attorney is acting in a foreign jurisdiction in accordance with that jurisdiction's Code of Professional Responsibility, his conduct is ethical per se. While the Maryland Code of Professional Responsibility may impose different or more stringent requirements on its attorneys, it does not require its attorneys to behave in a manner that is inconsistent or at variance with the code of conduct prescribed by another jurisdiction when practicing law there.

Maryland State Bar Association Committee on Ethics, Op. 86–28 (Dec. 20, 1985). Major Mulliken.

Legal Assistance Resource Material

The Legal Assistance Items section of the January 1986 edition of *The Army Lawyer* contained a recommended list at page 42 of resource materials that all legal assistance officers should have in their possession. That list should be modified to add the following:

Under paragraph I. Regulatory and Policy Matters, add the following policy letters:

Policy Letter 85–9, Office of The Judge Advocate General, U.S. Army, subject: Army Legal Assistance Program, 17 December 1985, *reprinted in* The Army Lawyer, Jan. 1986, at 5.

Letter, DAJA–LA, Office of The Judge Advocate General, U.S. Army, subject: Army Tax Assistance Program, 18 Oct. 1985.

Policy Letter 81–3, Office of The Judge Advocate General, U.S. Army, subject: Army Legal Assistance Program, 15 Dec. 1981, should be deleted from the list.

Tax News

New Recovery Period for Real Property

Many Army personnel rent their homes upon departure from a duty station. This may be either a voluntary decision or an involuntary decision caused by adverse real estate markets. For those who placed their property into service as income producing property after May 8, 1985, the property will be classified as nineteen year recovery property and depreciated under new tables that the Internal Revenue Service recently released. Use of the Accelerated Cost Recovery System (ACRS) is mandatory for property placed in service after December 31, 1980, unless the property was owned by the taxpayer before 1981 though not placed in service as income producing property until after 1981. Those placing their property in service after May 8, 1985 will use the nineteen year normal ACRS table that calculates depreciation using the 175% declining balance method at first, and later switches to the straight line method to maximize annual deductions. Alternatively, taxpayers can elect to use the straight line method. Taxpayers who use the nineteen year ACRS tables and later dispose of the property will have to recapture some of the depreciation taken as ordinary income if the taxpayer has a gain on the disposition. In the alternative, if straight line tables are elected, no ordinary income will have to be recaptured upon a subsequent disposition. The tables showing the allowable percentages for the first year of use for both the normal 175% ACRS depreciation and for the straight line appear below:

Month placed in service	175% Normal ACRS	Straight Line
1	8.8	5.0
2	8.1	4.6
3	7.3	4.2
4	6.5	3.7
5	5.8	3.3
6	5.0	2.9
7	4.2	2.4
8	3.5	2.0
9	2.7	1.5
10	1.9	1.1
11	1.1	.7
12	.4	.2

The form upon which depreciation is calculated, Form 4562, has not been revised to include the nineteen year property. The IRS has indicated that taxpayers who are claiming nineteen year property on their 1985 tax returns should use the 1985 Form 4562, and should enter the recovery deduction in the space provided below line 4g on the Form 4562.

Nonrecognition of Gain Upon Sale of Home

As moving season approaches, legal assistance officers can expect to encounter questions concerning rental and sale of homes. The advice to be given is often complicated because of the federal income tax implications involved. This advice is important because the family home is the most significant investment most people ever hold. The federal income tax law impacting on the sale of a residence which had been previously rented was further confused, but at least confused to the benefit of the taxpayer, by the recent Ninth Circuit decision in *Commissioner v. Bolaris,* 776 F.2d 1428 (9th Cir. 1985).

When a taxpayer sells a residence and the sale results in a gain, the taxpayer generally must pay tax on the gain unless the nonrecognition provisions of I.R.C. § 1034 apply. Those provisions permit the taxpayer to defer any tax on the gain if the taxpayer purchases a more expensive home during the replacement period. For members of the Armed Forces on active duty, the replacement period may extend up to a maximum of four years from the date of sale, or up to eight years if the soldier is assigned outside the United States, or if after returning from an assignment outside the United States, is required to reside in government quarters because of a shortage of off-post housing at a remote site. For section 1034 to apply and permit nonrecognition of the gain, the residence sold must qualify as a "primary residence."

When a taxpayer sells the home which the taxpayer is currently living in, there is generally no issue concerning whether the home qualifies as a primary residence. When the taxpayer is renting the home to another at the time of the sale, however, a genuine issue is raised, and the IRS will normally take the position that, because the home was being rented, the taxpayer abandoned it as a primary residence. The result is that the taxpayer will be denied the nonrecognition provisions of section 1034, and will have to realize tax on the gain generated by the sale.

Fortunately, two theories exist that can be argued to avoid this result. The first theory is the temporary rental theory. Under that theory, the taxpayer will be permitted to defer recognition of the gain if the taxpayer can show that the rental was only temporary, and that the home remained the taxpayer's "primary residence" during the rental. The clearest example of that theory is found in the case of *Barry v. Commissioner,* 30 T.C.M. (CCH) 757 (1971). Barry was an Army colonel who owned a home in Annapolis. When Barry was assigned overseas, he rented his home immediately, without any efforts to sell it, because he intended to return to the home for retirement. He rented the home primarily for care and maintenance, initially for a year lease, and thereafter on month-to-month leases. He never realized any significant profit from the rental. Barry's plans changed, however, when he returned from overseas and accepted a job in Denver. He sold his Annapolis home at that time. The IRS attempted to deny the nonrecognition provisions of section 1034, arguing that Barry had abandoned the home as his primary residence. Barry prevailed, however, on the theory that the home always remained his primary residence and that he had only rented it temporarily for care and maintenance while gone.

The second exception to permit application of the nonrecognition provisions of section 1034 is the prevailing economic circumstances theory. Under this theory, the taxpayer initially attempts to sell the residence, but, due to an adverse real estate market, is unable to sell and is forced to rent the residence because of financial needs. One example of that theory is found in *Clapham v. Commissioner,* 63 T.C. 505 (1977). Clapham's employment required that he move, and he attempted to sell his house. Clapham's initial sales efforts were not successful; he listed the home with a real estate agent, leaving it vacant to facilitate the sale. After not receiving any offers to purchase the home, Clapham was experiencing the resulting financial pressures of paying the mortgage, and therefore accepted an offer to rent the home with an option to buy it. The initial renter moved out one year later, and Clapham again tried to sell the house, again leaving it vacant to assist the sale. He had no success in selling the house, and was forced to rent it a second time. A few months later, the house was again left vacant and then was finally sold. The IRS attempted to deny Clapham's application of section 1034, arguing that Clapham had abandoned the home as a primary residence. Clapham, however, prevailed on the theory that the rental was only ancillary to the efforts to sell it, and was necessitated by the adverse real estate market and economic circumstances. The court was persuaded by the evidence of the adverse market and because the leases were of short duration, often contained an option to buy, and because Clapham frequently left the residence unrented to facilitate sale.

Both the temporary rental theory and the prevailing economic circumstances theory are valid and available to permit rollover of gain on a residence that is sold while rented. The difficult issue that remains concerns what deductions a taxpayer can take while the home is rented, if the taxpayer wants to later claim that the home is a primary residence for purposes of section 1034.

The difficulty in this area was caused by the Tax Court's decision in *Bolaris v. Commissioner,* 81 T.C. 840 (1984). In *Bolaris,* the Tax Court permitted the taxpayer to rollover the gain on the sale of his home into a new home which Bolaris had constructed, but the court denied Bolaris deductions from the rental property to the extent they exceeded rental income. Bolaris was a home owner in San Jose, California, who decided to build a larger home. When

the construction was complete, Bolaris moved into the home and put the old home on the market, hoping to sell it and rollover any gain into the new, more expensive home. Bolaris initially tried to sell the home himself for ninety days. Bolaris was unsuccessful, and therefore had to rent the home on a month-to-month basis. After eight months, Bolaris asked the tenant to leave, hoping to improve the saleability of the home. Six weeks later, Bolaris received and accepted his first offer to purchase the home. Because the purchasers had difficulty obtaining financing, Bolaris rented the old home to the buyers until the financing was obtained. On his tax returns for the two years the property was for sale and rented, Bolaris deducted expenses and depreciation, coupled with interest and taxes on the property, which exceeded the amount of rental income Bolaris received from the property.

The Tax Court permitted Bolaris to rollover the gain on the sale into the new home, finding that the prevailing economic circumstances theory applied. The court, however, denied the depreciation and expense deductions to the extent that the total deductions from the property exceeded the rental income. The Tax Court accepted the IRS's argument that the depreciation and expense deductions were only available for property used in a trade or business or held for the production of income. The IRS argued that categorizing a home as a "primary residence" for purposes of the section 1034 rollover was in contradistinction to property used in a trade or business or held for production of income. Accordingly, the Tax Court denied the deductions for depreciation and expenses to the extent they, in conjunction with the deductions for interest and taxes that all taxpayers can take, exceeded the rental income from the property.

Bolaris appealed to the Ninth Circuit and prevailed. *Bolaris v. Commissioner,* 776 F.2d 1428 (9th Cir. 1985). First, the Ninth Circuit rejected the position that categorization as a primary residence for purposes of the section 1034 rollover is in contradistinction to property held for the production of income. Rather, the court indicated that the taxpayer would also be eligible for deductions under sections 167 and 212 if the taxpayer engaged in the activity with a predominant purpose and intention of making a profit. The court listed five factors for determining whether the required profit motive existed:

1. the length of time the house was occupied as the taxpayer's residence before placing it on the market for sale;
2. whether the taxpayer permanently abandoned all further personal use of the home;
3. the character of the property (recreational or otherwise);
4. offers to rent; and
5. offers to sell.

The court applied these factors and found that Bolaris had the requisite profit motive. The court highlighted that Bolaris had completely abandoned all interest in the property when he rented it, that the property was not recreational property, and that he had rented it at fair market value. The IRS argued that Bolaris could not have had a profit motive because his rental payments were less than his mortgage payments. The court indicated that the other factors outweighed this, but cautioned that "sustained unexplained losses are probative of a lack of profit motive."

Based on the Ninth Circuit decision in *Bolaris,* taxpayers who rent out their primary residence prior to a sale may be able to take depreciation and expense deductions if they can show a predominant purpose and intent of making a profit. There is, however, no guarantee, and it would appear that taxpayers who rely on the prevailing economic circumstances theory might have a better argument than those who rely on the temporary rental theory because, in the latter case, the taxpayer is alleging that the motive for renting the property was primarily for its upkeep and with a view toward returning to the property. Major Mulliken.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Claims Service Seeks Reserve Component Judge Advocate Assistance

The U.S. Army Claims Service is seeking Reserve component judge advocates who are interested in assisting in the investigation and/or resolution of claims against the government. The Judge Advocate Guard and Reserve Affairs Department, TJAGSA, is coordinating the program, which is aimed at increasing the use of JAGC Reserve officers in accomplishing the Army's Claims mission. Participation in the program can be on a limited basis or a more involved basis depending upon the time commitment the Reservist wants to make. Reserve component judge advocates interested in this program should contact Lieutenant Colonel William O. Gentry at The Judge Advocate General's School (804–293–6121). Previous experience in the claims area is preferable but not required. Qualified Reservists can earn retirement point credit or, in some instances, may receive pay for assisting in this valuable and important training mission.

On-Site Schedule Change

This action officer for the Chicago, Illinois On-Site has been changed to Major Terrence J. Benshoff, 123 Grove Avenue, Glen Ellyn, Illinois 60137, (312) 984–3838. All other information published in the August 1985 issue of *The Army Lawyer* regarding this On-Site remains the same.

Enlisted Update

Sergeant Major Gunther Nothnagel

During his proponent review of PMOS 71D/E, The Judge Advocate General expressed concern for the welfare of our legal specialists and court reporters and directed the formation of a JAGC Enlisted Force Management Study Team. The purpose of the study team is to analyze areas of concern pertaining to our soldiers and to develop recommendations that will improve the management of our enlisted force. The study is expected to be completed by 1 May 1986, and results will be announced at the Chief Legal NCO Conference in June 1986. Current areas of concern are listed below:

a. Promotion opportunities in PMOS 71D/E.
b. Reclassification initiatives for skill level 2 and 3, PMOS 71D.
c. Training Accession, skill level 1, PMOS 71D.
d. 71D/E Assignments.
   (1) CONUS no-shows.
   (2) Deferment/Deletion policies.
   (3) Extension Policies—USAREUR/EUSA.
   (4) Spreading of 71D/E resources.
   (5) Assignments.
e. Reconciliation of 71D/E spaces in TAADS.
f. Non-Resident Training.
   (1) Correspondence Courses.
   (2) Development of Legal Specialist Handbook.
   (3) Additional Course Requirements.
g. Viable Force Structure—PMOS 71D/E.

1986 SQT. The 1986 Skill Qualification Test for MOS 71D/E will be implemented during August 1986. The examinations will include changes brought about by the new MCM. A revised Soldier's Manual is expected to be fielded during March of 1986. While the new Soldier's Manual is not as all-emcompassing as the previous issues, it still remains an excellent reference/study guide for the exams. Because the 1986 SQT scores will have great impact on the selection process for promotion, a high score is a must if one expects to get ahead. Having reviewed the examinations along with several other of our senior NCOs, I found them to be fair examinations for which one had to study. Several of our senior NCOs had difficulty with the exams in those areas they had not worked before.

71D/E BTC Course. A new basic technical course for our SGT 71D/Es was held at Fort Benjamin Harrison, IN, in February and will be repeated in July 1986. MILPERCEN has changed the policy whereby a SGT had to request attendance at the course by submitting a DA Form 4187. MILPERCEN will now automatically make the selections. Our 71D school personnel are currently studying a proposal to develop a non-resident BTC course for MOS 71D/E.

Sergeant Major Bob Giddens, Chief Legal NCO, 2d U.S. Army, sat on the recent SFC promotion board that terminated on 8 November 1985. Overall, the promotion packets which were reviewed by him were in excellent shape. To highlight some of the problems encountered during his review of records, SGM Giddens has written an article on the subject that will be published in the April issue of *The Army Lawyer.*

Due to the increase in 71E authorizations, we continue to have a shortage of court reporters. Those desiring to become court reporters are encouraged to see their Chief Legal NCO who can assist in obtaining a quota for the course. In an effort to alleviate the shortage, MILPERCEN will also waive the requirement that a 71E applicant possess PMOS 71D, provided the soldier is otherwise qualified.

MSG Beta Towns, Chief Legal NCO, Fort Rucker, Alabama, has been selected as the new TJAG Liaison NCO to MILPERCEN. She will assume her new duties in July 1986.

Status of MOS 71D20. Our current strength posture for SGT, 71D20, is at 152%. This overage of 203 soldiers was created by the new standards of grade authorization in AR 611–201 which downgraded the battalion legal specialist position to SP4. Because of this overage, the promotion cut-off score to SGT will remain high until we are able to get in line with our authorizations. The Judge Advocate General's concern regarding promotion stagnation will receive intense consideration by the JAGC Enlisted Force Management Study Team.

Promotion outlook to SSG MOS 71D30. With the recent selection of 50 71Ds for promotion to SFC, the current overage of 51 71D30s should be alleviated within the next 12 months. Consequently, promotion cut-off scores should drop to allow for limited promotions to SSG.

AR 611–201. The April 1986 UPDATE of AR 611–201 will include several changes to the Job Tasks for 71D/Es. The changes were made to clarify training tasks and to delete those tasks which no longer applied to either MOS. The update is also expected to exempt Reserve component soldiers from the requirement that they be school trained only at active Army schools.

71D Strength Posture. During the past year, our overall strength posture for MOS 71D has declined. With priority of fill to USAREUR and EUSA, CONUS installations have been forced to bear the brunt of the shortage as CONUS installations serve as the sustaining base for overseas commands. To alleviate the shortage of 71D soldiers, The Judge Advocate General has requested and received additional school seats. Approximately six hundred 71Ds are expected to be trained at Fort Benjamin Harrison. Until the bulk of these soldiers are trained and join us in the field, each Chief Legal NCO of a CONUS installation must closely monitor his or her projected gains, TAADS, and losses. Where possible, our liaison personnel will assist in resolving manpower shortages based on available resources.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

April 1-4: JA USAR Workshop.

April 8-10: 6th Contract Attorneys Workshop (5F-F15).

April 14-18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21-25: 16th Staff Judge Advocate Course (5F-F52).

April 28-9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5-9: 29th Federal Labor Relations Course (5F-F22).

May 12-15: 22nd Fiscal Law Course (5F-F12).

May 19-6 June 1986: 29th Military Judge Course (5F-F33).

June 2-6: 84th Senior Officers Legal Orientation Course (5F-F1).

June 10-13: Chief Legal Clerk Workshop (512-71D/71E/40/50).

June 16-27: JATT Team Training.

June 16-27: JAOAC (Phase II).

July 7-11: U.S. Army Claims Service Training Seminar.

July 14-18: Professional Recruiting Training Seminar.

July 14-18: 33d Law of War Workshop (5F-F42).

July 21-25: 15th Law Office Management Course (7A-713A).

July 21-26 September 1986: 110th Basic Course (5-27-C20).

July 28-8 August 1986: 108th Contract Attorneys Course (5F-F10).

August 4-22 May 1987: 35th Graduate Course (5-27-C22).

August 11-15: 10th Criminal Law New Developments Course (5F-F35).

September 8-12: 85th Senior Officers Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

June 1986

1-11: SLF, American & International Law, Dallas, TX.

2-3: NYUSCE, Legal Issues in Acquiring & Using Computers, San Francisco, CA.

5-6: PLI, Tax Strategies for Corporate Acquisitions, San Francisco, CA.

7-13: ATLA, Advanced Course in Trial Advocacy, Ann Arbor, MI.

9-10: PLI, Professional Liability Insurance Coverage Problems, San Francisco, CA.

12-13: PLI, Commercial Real Estate Leases, San Francisco, CA.

16-18: PLI, Preparation of Federal Estate Tax Return, San Francisco, CA.

16-20: ALIABA, Estate Planning in Depth, Madison, WI.

18-20: PLI, 15th Annual Institute on Employment Law, New York, NY.

19-20: NYUSCE: Legal Issues in Acquiring & Using Computers, New York, NY.

19-20: PLI, Libel Litigation, New York, NY.

19-20: PLI, Preparation of Fiduciary Income Tax Return, San Francisco, CA.

20-21: KCLE, Health Services Law, Lexington, KY.

23-27: ALIABA, Environmental Litigation, Boulder, CO.

26-27: PLI, Negotiation Workshop for Lawyers, San Francisco, CA.

27-28: GICLE, Admiralty Law Institute, Atlanta, GA.

28-31: FBA, FBA Annual Convention, Orlando, FL.

29/7-4: NITA, Advanced Trial Advocacy Program, Boulder, CO.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1986 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Vermont	1 June every other year
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1986 issue of The Army Lawyer.

Current Material of Interest

1. Distribution of *The Army Lawyer* and the *Military Law Review*

Distribution of *The Army Lawyer* and the *Military Law Review* is made from a consolidated mailing list. Each active duty judge advocate should receive a copy, as should the SJA library. The editors rely on reports from SJAs, administrative technicians, and chief legal NCOs to keep the mailing list current. If your office is not receiving enough copies, or if you are receiving too many copies, please contact the Editors, The Judge Advocate General's School, Army, ATTN: JAGS-DDL, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-7376; FTS 938-1394; commercial (804) 293-7376). You should also notify the editors if your office has a nine digit ZIP code.

2. Outstanding Young Military Service Lawyer Awards for 1986

The Military Service Lawyers Committee of the Young Lawyers Division of the American Bar Association is accepting nominations for the "Outstanding Young Military Service Lawyer" in each uniformed service for 1985-86. Separate award certificates will be presented to the Army, Navy, Air Force, Marine Corps, and Coast Guard selectees. The criteria for the awards are:

Demonstrated excellence in the delivery of legal services;
Proven qualities of leadership;
Consistently outstanding performance of all assigned duties;
Demonstrated scholarly ability;
Service to the community; and
Under age 36 as of 1 July 1985.

Nominees are not required to be ABA members. Nominations, which may be made by any licensed attorney, must include a detailed description of the nominee's qualifications and may include necessary supporting documentation. Forwarding endorsements by military superiors that do not add new information as to the nominee's qualifications are discouraged. The entire nomination package should not exceed ten pages. Three copies of the nomination package should be mailed directly to: ABA/YLD Military Service Lawyers Committee, c/o Captain Chester Paul Beach, Jr., Chairperson, 7909 Carrousel Court, Annandale, Virginia 22003-1414.

All nominations must be postmarked not later than 31 May 1986. The awards will be announced and the recipients honored at the American Bar Association's annual meeting in New York City, 7-10 August 1986.

3. TJAGSA Publications Available Through DTIC

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

Contract Law

AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-85-1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-85-2 (175 pgs).
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1 (230 pgs).

Legal Assistance

AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).
AD B077739	All States Consumer Law Guide/ JAGS-ADA-83-1 (379 pgs).
AD B089093	LAO Federal Income Tax Supplement/ JAGS-ADA-85-1 (129 pgs).
AD B077738	All States Will Guide/JAGS-ADA-83-2 (202 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS-ADA-85-7 (355 pgs).
AD B094235	All-States Law Summary, Vol II/ JAGS-ADA-85-8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS-ADA-85-9 (226 pgs).

Claims

AD B087847	Claims Programmed Text/ JAGS-ADA-84-4 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-84-6 (39 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).
AD B087774	Government Information Practices/ JAGS-ADA-84-8 (301 pgs).
AD B087746	Law of Military Installations/ JAGS-ADA-84-9 (268 pgs).
AD B087850	Defensive Federal Litigation/ JAGS-ADA-84-10 (252 pgs).
AD B087745	Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).

Labor Law

AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs).

Criminal Law

AD B086937	Criminal Law, Evidence/ JAGS–ADC–84–5 (90 pgs).
AD B086936	Criminal Law, Constitutional Evidence/ JAGS–ADC–84–6 (200 pgs).
AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B095870	Criminal Law: Jurisdiction, Vol. I/ JAGS–ADC–85–1 (130 pgs).
AD B095871	Criminal Law: Jurisdiction, Vol. II/ JAGS–ADC–85–2 (186 pgs).
AD B095872	Criminal Law: Trial Procedure, Vol. I, Participation in Courts-Martial/ JAGS–ADC–85–4 (114 pgs).
AD B095873	Criminal Law: Trial Procedure, Vol. II, Pretrial Procedure/JAGS–ADC–85–5 (292 pgs).
AD B095874	Criminal Law: Trial Procedure, Vol. III, Trial Procedure/JAGS–ADC–85–6 (206 pgs).
AD B095875	Criminal Law: Trial Procedure, Vol. IV, Post Trial Procedure, Professional Responsibility/JAGS–ADC–85–7 (170 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

4. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
UPDATE #7	All Ranks Personnel		1 Jan 86
UPDATE #7	Enlisted Ranks		15 Jan 86
AR 340–21–1	Army Privacy Program—System Notices and Exemption Rules		16 Dec 85
AR 600–20	Personnel-General Army Command Policy and Procedures	106	29 Jan 86
AR 670–1	Wear and Appearance of Army Uniforms and Insignia		16 Jan 86
DA Pam 27–21	Military Administrative Law		1 Oct 85
DA Pam 360–503	Voting Assistance Guide		86–87

5. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594.

Bershad, *Discriminatory Treatment of the Female Offender in the Criminal Justice System*, 26 B.C.L. Rev. 389 (1985).

Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 Ind. L.J. 287 (1985).

Cardos, Perry, & Sinnott, *The Uniform Services Former Spouses Protection Act*, Fed. B. News & J., Jan. 1986, at 33.

Donnelly & Van Ness, *The Warrior and the Druid—The DOD and Environmental Law*, Fed. B. News & J., Jan. 1986, at 37.

Frude, *The Sexual Abuse of Children Within the Family*, 4 Med. & L. 463 (1985).

Graham, *Evidence and Trial Advocacy Workshop: Impeachment—Contradiction; Partiality; Prior Acts of Misconduct; Character; Religious Beliefs*, 21 Crim. L. Bull. 495 (1985).

Hardy, *Product Liability and Weapons Manufacture*, 20 Wake Forest L. Rev. 541 (1984).

Hawkins, *Psychiatric Evaluations of Criminal Defendants: Their Rights in the USA*, 4 Med. & L 441 (1985).

Henderson, *The Wrongs of Victims Rights*, 37 Stan. L. Rev. 938 (1985).

Kabatchnick & Kabatchnick, *Practice Before the Boards for Correction of Military Records Within the Various Military Departments*, Fed. B. News & J., Jan 1986, at 17.

Kiss, *The Protection of the Rhine Against Pollution*. 25 Nat. Resources J. 613 (1985).

Langley, *How to Represent Your Client Agency in an Adverse Action Before the MSPB*, Fed. B. News & J., Jan. 1986, at 27.

Levick, *The ERA and Family Law: Making Equality Work for Men and Women*, 23 J. Fam. L. 521 (1984).

Pollard, *Investing in an IRA: How to Jump on the Bandwagon Without Getting Taken for a Ride*, 10 Rev. Tax'n Individuals 58 (1986).

Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 Gonz. L. Rev. 1 (1985).

The Supreme Court, 1984 Term, 99 Harv. L. Rev. 1 (1985).

Vinson, *How to Persuade Jurors*, A.B.A.J., Oct. 1985, at 72.

Wolfe, *A Strategy for Effective Use of the Courtroom During Direct Examination*, 8 Am. J. Trial Advoc. 205 (1984).

Word, *Risk and Knowledge in Interspousal Conflicts of Interest: The Search for Competent Counsel Through Model Rule 1.8(i)*, 7 Whittier L. Rev. 943 (1985).

Comment, *Reforming Environmental Law*, 37 Stan. L. Rev. 1333 (1985).

Note, *Developments Under the Freedom of Information Act—1984*, 1985 Duke L.J. 742.

Note, *Homosexuals in the Military: They Would Rather Fight Than Switch*, 18 J. Mar. L. Rev. 937 (1985).

Note, *Political Legitimacy in the Law of Political Asylum*, 99 Harv. L. Rev. 450 (1985).

Note, *Wrongful Fraternization as an Offense Under the Uniform Code of Military Justice*, 33 Cleve. St. L. Rev. 547 (1984–85).

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